Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Petitioners,

v.

DONALD L. EVANS, *et al.*,

Respondents.

On Appeal from the United States District Court for the District of Utah

JURISDICTIONAL STATEMENT

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Building
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 14, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the court below erred in ruling that the Census Bureau, if it chooses to use the authority granted in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), to include in the apportionment count overseas federal employees who have retained ties to their home States, may nevertheless, consistent with the Census Act and the Constitution's Census Clause, automatically exclude other identifiable Americans living abroad who have retained similar ties to their home States, on the grounds that overseas federal employees (a) constitute a reasonably representative sample of all Americans living abroad, (b) are generally easier to identify than most other Americans living abroad, or (c) are entitled to special recognition in the apportionment count for the "involuntariness of their overseas posting, at the behest of their government."

2. Whether the court below erred in ruling that an action by the federal government that has an obvious *tendency* to deter particular religious conduct – in this case overseas missionary service during the taking of the census – nevertheless does not impose a "substantial burden on religion" within the meaning of the Religious Freedom Restoration Act, and otherwise does not violate that Act or the First Amendment's Free Exercise Clause, merely because the plaintiffs cannot establish that they were *personally* deterred from engaging in that religious conduct.

PARTIES TO THE PROCEEDING

The appellants herein, who were plaintiffs before the three-judge district court, are the State of Utah; Michael O. Leavitt, Governor; Olene S. Walker, Lieutenant Governor; Mark L. Shurtleff, Attorney General; L. Alma Mansell, President, Utah Senate; Martin R. Stephens, Speaker, Utah House of Representatives; Mike Dmitrich, Minority Leader, Utah Senate; Ralph Becker, Minority Leader, Utah House of Representatives; U.S. Senators Orrin G. Hatch and Robert F. Bennett; U.S. Representatives James V. Hansen, Christopher B. Cannon, and James Matheson; and Utah residents Blake J. Russon, Michael Wayne Anderson, Brent McGhie, and Jean McGhie, all four of whom were serving overseas missions for the Church of Jesus Christ of Latter-day Saints on April 1, 2000.

The appellees in this Court, who were the principal defendants below, are Donald L. Evans, Secretary of the United States Department of Commerce; and William G. Barron, Acting Director of the United States Census Bureau.

Additional appellees, who appeared as defendant-intervenors below, include the State of North Carolina; Michael F. Easley, Governor; Beverly Perdue, Lieutenant Governor; Roy Cooper, Attorney General; Marc Basnight, President Pro Tempore, North Carolina Senate; James Black, Speaker, North Carolina House of Representatives; Patrick Ballentine, Minority Leader, North Carolina Senate; Leo Daughtry, Minority Leader, North Carolina House of Representatives; U.S. Senators Jesse Helms and John Edwards; and U.S. Representatives Eva M. Clayton, Bob Etheridge, Walter B. Jones, David Price, Richard Burr, J. Howard Coble, Mike McIntyre, Robin Hayes, Sue Myrick, T. Cass Ballenger, Charles H. Taylor, and Melvin L. Watt.

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OPINION BELOW

The opinion of the three-judge district court (App. 1a-22a) is reported *sub nom. Utah* v. *Evans* at 143 F. Supp. 2d 1290 (D. Utah 2001).

JURISDICTION

The judgment of the three-judge district court was entered on April 17, 2001. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section II, Clause 3 of the United States Constitution is reproduced at App. 23a.

2. Amendment I of the United States Constitution is reproduced at App. 23a.

3. Sections 1 and 2 of Amendment XIV of the United States Constitution are reproduced at App. 23a-24a.

4. Sections 141(a) and 195 of Title 13, United States Code, are reproduced at App. 25a.

5. Sections 2000bb-1 through 2000bb-3 of Title 42, United States Code, are reproduced at App. 25a-27a.

STATEMENT OF THE CASE

In this lawsuit, the State of Utah, many of its elected officials, and four Utah residents who were serving as overseas missionaries for the Church of Jesus Christ of Latter-day Saints ("LDS Church") on April 1, 2000 (collectively, "Utah") challenge the discriminatory treatment of the population of Americans temporarily residing abroad in the 2000 census. Specifically, in the 2000 census the Secretary of Commerce and the Director of the Census Bureau (collectively "the Bureau") included only federal

employees in the overseas "population" enumerated for purposes of congressional apportionment, and excluded from that enumeration other citizens who were temporarily absent under similar circumstances.

In upholding that result, the three-judge district court relied heavily on this Court's decision in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), which upheld the Bureau's decision to include overseas federal employees but left open the question of how to treat other Americans living abroad. Based on its reading of that decision, the district court unjustifiably assumed that overseas federal employees are entitled to preferential treatment because they allegedly constitute a reasonably representative sample of all Americans living abroad, are generally easier to identify than most other Americans living abroad, and are somehow entitled to special recognition in the apportionment count for the "involuntariness of their overseas posting, at the behest of their government." App. 17a. The district court also held that the Bureau's policy, although it obviously dilutes the relative voting power of individuals serving as religious missionaries abroad (and may therefore deter missionary activity during future decennial censuses), nevertheless does not impose a "substantial burden" on religion because the plaintiffs here were unable to show that this policy – which was not widely known prior to this case – actually deterred them from serving as missionaries during the census period.[1]

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[1] The same parties are currently involved in a separate action in the three-judge court for the District of Utah arising out of the Census Bureau's enumeration of the domestic population. *Utah* v. *Evans*, No. 2:01-CV-292G (D. Utah filed Apr. 25, 2001). In that action, Utah has challenged the Bureau's decision to supplement the domestic count by means of a statistical sampling technique known as "hot-deck imputation." The Bureau's use of hot-deck imputation had the same affect on apportionment as the partial count of the overseas population. That is, if the Bureau had limited its apportionment count to those persons *actually enumerated* (*i.e.*, by the mail-in questionnaire or by a contact by a census enumerator), and had not supplemented that count by adding persons who

1. As this Court is well aware, the census is conducted pursuant to Article I, Section 2, Clause 3 of the United States Constitution. As modified by the Fourteenth Amendment, the so-called "Census Clause" requires Congress to conduct an "actual Enumeration" of "the whole number of persons in each State" every ten years, and to use that enumeration as the basis for apportioning seats in the House of Representatives. U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. Through the Census Act, 13 U.S.C. § 1 *et seq.*, Congress has delegated responsibility for conducting the census to the Secretary of Commerce, who is directed to conduct "a decennial census" of the "population" of each State on "the first day of April of [each] such year." 13 U.S.C. § 141(a).

To enumerate each State's "population" in the decennial census, the Bureau establishes rules to determine who should be counted, and to which State each person should be allocated for purposes of congressional apportionment. The latter rules historically have directed the Bureau to determine each individual's place of "usual residence," *i.e.*, the State in which each person normally resides despite occasional absences.

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were never actually counted but only "imputed" by application of a statistical sampling technique, Utah would have been entitled to a fourth representative in the U.S. House of Representatives, North Carolina would not have received its 13th representative in the House, and no other State's apportionment would have been affected. Utah's Complaint in the imputation case challenges the use of hot-deck imputation as a method of "sampling" prohibited by the Census Act, 13 U.S.C. § 195; *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 344 (1999) (holding that "the Census Act prohibits the . . . use[] of statistical sampling in calculating the population for purposes of apportionment"), and as a method of estimation inconsistent with the Constitutional requirement of an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3. The imputation case is set for oral argument in the three-judge court on the parties' cross-motions for summary judgment on August 29, 2001. Because a favorable decision in that case may give Utah the relief it seeks here, it has not yet sought expedited briefing in this case.

In the first Census Act, Congress adopted a broad "usual residence" rule, such that "every person occasionally absent at the time of the enumeration [was counted] as belonging to that place in which he usually resides in the United States." Act of Mar. 1, 1790, ch. 2, § 5, 1 Stat. 101, 103. As this Court recognized in *Franklin* v. *Massachusetts*, 505 U.S. 788, 804 (1992), this Act "placed no limit on the duration of the absence." *Id.* at 804. Moreover, "[i]n the related context of congressional residence, James Madison interpreted the constitutional term 'inhabitant' to include 'persons absent occasionally for a considerable time on public or private business.'" *Id.* at 805 (citation omitted) (quoting 2 *Records of the Federal Convention of 1787*, at 217 (Max Farrand ed., rev. ed. 1966).

Under the Bureau's current policies, by contrast, "usual residence" is defined as the place where a particular individual presently lives and sleeps most of the time. Thus, under the rules governing recent censuses, U.S. citizens residing in foreign countries generally have not been deemed part of the "population" of any State, and therefore have been excluded from the apportionment count – even if they intended to return to their respective home States within a specified period.

2. As this court also recognized in *Franklin*, the Bureau implemented a narrow exception to those rules in the 1970 and 1990 censuses, and the Bureau applied the same exception again in the 2000 census. That exception applies only to persons employed by the federal government while residing overseas; it authorizes the Census Bureau to count such persons and to apportion them to their respective home States by reference to administrative records maintained by various federal agencies.

The Bureau's practice of counting overseas federal employees has affected congressional apportionment on at least one previous occasion: it caused one seat to shift from Massachusetts to Washington following the 1990 census.

Massachusetts filed a lawsuit challenging that practice, arguing, among other things, that the inclusion of *any* citizens residing overseas violates the Census Clause because such citizens' "usual residence" is, by definition, outside the United States. *Franklin*, 505 U.S. at 803.

This Court rejected that argument. First, the Court explained that, from its inception, the Census Bureau has made apportionment decisions according to each individual's "[u]sual residence," a semantic touchstone that "can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. The Court noted that the Bureau had determined that "many federal employees temporarily stationed abroad had retained their ties to the States" and "consider themselves to be usual residents of the United States." *Id.* at 806 (internal citations and quotation marks omitted). In addition, the Court pointed to James Madison's interpretation of the term "inhabitant" in the constitutional provisions governing congressional residence qualifications, U.S. Const. art. I, § 2, cl. 3, which included "'persons absent occasionally for a considerable time on public *or private* business.'" *Franklin*, 505 U.S. at 805 (quoting 2 *Records of the Federal Convention of 1787*, at 217 (Max Farrand ed., rev. ed. 1966).

Accordingly, the Court upheld the Bureau's decision to include federal employees stationed overseas in the apportionment count, finding that counting such federal employees "does not hamper the underlying constitutional goal of equal representation" and in fact "promotes equality." *Id.* at 806. Indeed, the Court explained that a decision to exclude such persons from the census could implicate the Census Clause by preventing "the votes of all those who reside in [a particular] State" from being "weighted equally to votes of those who reside in other States." *Id.*

The Court, however, did not address the issue of how to treat other Americans living abroad who might retain equal or

even stronger ties to their home States than overseas federal employees. Moreover, although the Court ultimately upheld the Bureau's decision to count the latter group, the Court expressly acknowledged that a constitutional violation might be made out on a different factual showing. For example, the Court concluded that Massachusetts had failed to demonstrate that its proposed remedy – "eliminating overseas employees entirely from the state counts" – would "make representation in Congress more equal." *Id.* at 806.[2]

3. On December 28, 2000, the Bureau announced that the partial enumeration of the overseas population had resulted in North Carolina's gaining an additional seat – its thirteenth – in the House of Representatives. That seat would have been Utah's fourth if an additional 857 individuals had been included in its apportionment population. See Amended Statement of Undisputed Facts ("ASUF") ¶ 29, at 19, *attached to* Plaintiffs' Reply Memorandum in Support of Summary Judgment, *Utah* v. *Evans*, No. F-2-01-CV-23 B (D. Utah Mar. 5, 2001) ("Utah Reply"). As the plaintiffs established through evidence submitted to the district court, Utah would have been entitled to a fourth Representative

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[2] The Court has articulated and applied this "equal representation" approach in other recent decisions, most notably *Wisconsin* v. *City of New York*, 517 U.S. 1 (1996). In *Wisconsin*, the Court rejected a challenge to the Bureau's decision not to use the "post-enumeration survey" ("PES") – a statistical adjustment technique designed to correct the so-called "undercount" in the census. *Id.* at 19-20. The Court approved the Bureau's decision on the ground that "a preference for" enumeration methods that are likely to improve "distributive accuracy" (*i.e.*, a condition in which the census accurately reflects the respective populations of the 50 States in their proper proportions) over competing methods that may result in greater "numerical accuracy" (*i.e.*, a condition in which the census accurately reflects the total population of the country) "would seem to follow from the constitutional purpose of the census." *Id.* at 20. The Court then cited with approval the Bureau's conclusion that "unadjusted census data would be considered the most distributively accurate." *Id.*

following the 2000 census if the Bureau had (a) limited the apportionment count to the domestic resident population, (b) included LDS missionaries who had retained their ties to their home States and could be enumerated by reference to reliable administrative records, or (c) conducted an enumeration of all Americans residing temporarily abroad. See ASUF ¶ 38, at 21; see also *id.* ¶¶ 36-37, at 20-21, ¶¶ 39-51, at 21-25. Thus, the Bureau's partial enumeration of the overseas population diminished Utah's representation by 25% in the House of Representatives, and by nearly 17% in the Electoral College, as compared with any of these three alternatives.

Utah filed this lawsuit on January 10, 2001, alleging that this partial enumeration was unlawful under the Census Clause, the Census Act, the Free Exercise Clause, and RFRA. Utah also sought declaratory and injunctive relief directing the Bureau to treat overseas federal employees no differently than other similarly situated Americans residing abroad, including individuals who were temporarily serving overseas as missionaries for the Utah-based LDS Church, and whose inclusion would have entitled Utah to a fourth Representative. See ASUF ¶ 38, at 21.[3]

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[3] The district court incorrectly suggested that Utah was somehow barred under the prayer for relief in its Complaint from seeking a remedy requiring the Bureau to count any overseas Americans other than federal employees and LDS missionaries. App. 11a. First, as Federal Rule of Civil Procedure 54(c) expressly provides, "[e]xcept as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

Second, the district court was simply mistaken in concluding that Utah conceded that its Complaint lacked a prayer for such relief. At oral argument, counsel for Utah pointed out that the Complaint expressly requests a declaratory judgment that the Bureau's "disparate treatment of similarly situated citizens" is unlawful and also asks for "such further relief as this Court deems just and proper." *See* Second Am. Compl. at 18-19, *Utah* v. *Evans*, No. F-2-01-CV-23:B (D. Utah Jan. 30, 2001); *see also* Summ. J. Oral Argument Tr. at 26 (describing the scope of the relief

Although the Secretary of Commerce and the Director of the Census Bureau were the principal defendants named in Utah's complaint, they were later joined by the State of North Carolina and several of its officers and representatives, who intervened as defendants soon after the case was filed. Utah moved for summary judgment on all of its claims on January 30, 2001. Both sets of defendants subsequently moved to dismiss and cross-moved for summary judgment.

4. In summary judgment memoranda submitted to the district court, Utah repeatedly pointed out that its lawsuit presented the question that this Court had left unaddressed in *Franklin*, namely, how to treat overseas Americans who are not federal employees, but who retain similarly strong ties to their home States. Utah, moreover, raised four principal arguments in support of its claim that the Bureau's decision to count federal employees while excluding LDS missionaries violated the Census Clause and the Census Act.

First, Utah pointed out that the Bureau had made no attempt to comply with its statutory and constitutional duty to conduct an "actual Enumeration," U.S. Const. art. I, § 2, cl. 3, of the "the whole number of persons," *id.* amend. XIV, § 2, in the relevant "population as of [April 1, 2000]," 13 U.S.C. § 141(a). Instead, the Bureau had counted only a small *subset* of the overseas population -- one comprised exclusively of persons employed by the federal government -- thereby

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sought in Utah's complaint, and making specific reference to the plaintiffs' broad request for declaratory relief). As plaintiffs made clear in their briefs, this remedy would leave the Bureau free to count, not just LDS missionaries, but other groups of overseas Americans who are also situated similarly to overseas federal employees. *See* Utah Reply at 53 ("Plaintiffs seek a remedy that would preserve substantial discretion for the Secretary and the Census Bureau, and permit them to pursue any course that would treat LDS missionaries (and other groups who can show that they are similarly situated) in the same way that the 2000 census treats overseas federal employees").

disregarding the plain text of the governing statutory and constitutional provisions.

Second, Utah demonstrated that the Bureau's partial enumeration of the overseas population undermines the constitutional principles of "equal representation" and "distributive accuracy" set forth in *Franklin* and *Wisconsin* v *City of New York*, 517 U.S. 1, 20 (1996). Specifically, Utah pointed out that, to the extent an enumeration of overseas federal employees is legally justifiable, the same justification necessarily calls for a corresponding enumeration of *all* Americans residing temporarily overseas who are similarly situated, *i.e.*, those who "consider themselves to be usual residents of the United States," have "retained their ties to their home States," 505 U.S. at 806, and can be allocated to their respective States by reference to existing administrative records. See *id.*

Third, in response to arguments advanced by the defendants, Utah explained that, to the extent one might object to the inclusion of LDS missionaries because they comprise a small segment of the total overseas population, and their distribution among the States does not necessarily mirror that of the domestic resident population, the same objection would apply with equal force to overseas federal employees. See Utah Reply at 42-45. Thus, if LDS missionaries must, as the defendants argued,[4] be excluded from the apportionment count, so too must overseas federal employees, since a decision to enumerate only the latter does not bear the requisite "reasonable relationship to the accomplishment of an actual enumeration of the population,

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[4] *See* Federal Defs.' Mem. in Opposition to Summ. J. at 28, *Utah* v. *Evans*, No. F-2-01-CV-23.B (D. Utah Feb. 22, 2001) (arguing that a decision to "add to stateside population counts only one small segment . . . of a larger population universe (all private Americans living abroad)" would "bias[] the results" in favor of certain States and thus would "clearly violate[] the principles of distributive accuracy enshrined in *Wisconsin*.").

keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 20.

Fourth, in response to the Bureau's assertion that overseas federal employees constitute a reasonably representative sample of the total overseas population,[5] Utah showed that a decision to enumerate them on that basis cannot be reconciled with the Census Act, 13 U.S.C. § 195, which categorically prohibits the use of statistical sampling in the apportionment count. See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999) (interpreting 13 U.S.C. § 195 to prohibit the use of statistical sampling in the apportionment count).

With respect to its religious liberty claims, Utah pointed out that, in every respect relevant to the decennial census, LDS missionaries serving overseas are similarly situated to overseas federal employees, and are distinguishable only in that the former leave the country in furtherance of their religious beliefs, while the latter do so in furtherance of an employment arrangement with the federal government. Thus, Utah showed that the Bureau's decision to enumerate only the latter imposes a substantial burden on the free exercise of religion (since individuals derive a cognizable benefit from being counted in the decennial census), and otherwise runs afoul of the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment.

5. The three-judge district court heard oral argument on all dispositive motions on March 27, 2001. In a memorandum opinion dated April 17, 2001, the court granted summary judgment for the defendants and dismissed each claim raised by Utah.

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[5] *See* DOJ Mem. at 31-32 n.12 (asserting that "federal employees are distributed among the states in proportions approximately equal to the distribution amongst the states nationwide.").

In so doing, the district court reasoned that the Bureau's preferential treatment of overseas federal employees is justified by the fact that such persons are distinguishable from all other Americans residing abroad in each of the three respects identified by the defendants: (a) overseas federal employees constitute a reasonably representative sample of the entire overseas population, see App. 17a ("the distribution of federal overseas employees among the fifty states . . . does not present any extreme variations among the states"); see also DOJ Mem. at 31-32 n.12; (b) they are generally easier to identify than most other Americans living overseas, see App. 18a ("federal overseas employees are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas"); and (c) they are entitled to special consideration in the apportionment count because of the "involuntariness of their overseas posting, at the behest of their government," *id.* at 17a.

In so holding, the district court relied heavily on this Court's *Franklin* decision. Although the district court recognized that the Court in that case had no occasion to rule on the proper treatment of overseas Americans other than federal employees, the district court nevertheless reasoned that, because the *Franklin* Court presumably "knew that federal employees were not the only group of Americans abroad," App. 16a, the Court's *silence* regarding the Bureau's decision to exclude all other Americans living abroad makes that decision judicially unassailable. See *id.*

Perhaps because of its broad reading of *Franklin*, the district court simply side-stepped many of Utah's arguments under the Census Clause and the Census Act. For example, the district court failed to address Utah's textual argument that overseas federal employees cannot be deemed to constitute the "whole number of persons" in the relevant "population" of Americans living overseas under the

Constitution and the Census Act, but instead are at most an isolated subset of that population.[6] The district court also failed to come to grips with Utah's argument that LDS missionaries – who maintain close ties to their home States during their temporary absence overseas, and can easily be identified, enumerated, and allocated to their respective States by reference to administrative records – are constitutionally indistinguishable from overseas federal employees insofar as the decennial census is concerned. The court's only response to this argument was the blithe suggestion that LDS missionaries constitute an arbitrary segment of the overseas population whose State-by-State distribution does not mirror that of the domestic resident population. See App. 18a. At the same time, however, the district court never fully addressed the fact that this argument applies with equal force to overseas federal employees.[7] Similarly, the district court failed even to acknowledge Utah's argument that, to the extent defendants are correct in suggesting that the federal employee segment of the overseas population can be considered a "representative sample" of the full overseas population, the Bureau's partial count is unlawful under the Census Act, 13 U.S.C. § 195, as an impermissible attempt to introduce sampling into the apportionment count. See *House of Representatives*, 525 U.S. at 343 (concluding that 13

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[6] The Bureau, moreover, has never explained how its decision to exclude some overseas Americans while including others is consistent with these specific statutory and constitutional commands.

[7] To be sure, the district court noted that the State-by-State distribution of overseas federal employees "does not present any extreme variations among the states." App. 17a. Nevertheless, it never made any attempt to explain why the bias resulting from the inclusion of one segment of the population must be "extreme" to justify excluding that group from the census. Nor did it explain why, under the governing authorities, any identifiable group residing overseas can lawfully be excluded from the census merely because that group's distribution is different from, or more "extreme" than, the distribution of other enumerated components of the same population.

U.S.C. § 195 prohibits the use of sampling in the apportionment count).

In addressing the missionary plaintiffs' claims under the Free Exercise Clause and RFRA, the district court acknowledged that "missionary work is one of the most basic and important obligations of the LDS faith," App. 10a (internal quotation marks omitted). Without disputing the fact that LDS missionaries serving overseas were excluded from the 2000 census as a direct result of their decision to act in conformity with their religious beliefs, the panel concluded that the plaintiffs had failed to establish that the Bureau's actions imposed any burden on the free exercise of religion. See *id.* at 10a-11a.

This conclusion was based entirely on the absence of evidence showing that any of the missionary plaintiffs "was even aware of the upcoming Census when [they] decided to serve" missions, or that any of them knew that the Bureau's "failure to enumerate [missionaries residing overseas] would have any effect at all on the apportionment of House of Representative seats to Utah." App. 10a. Having concluded that the Bureau's actions did not impose a substantial burden on the free exercise of religion, the panel declined to consider whether any such burden could be justified under RFRA or the First Amendment.

Utah filed a timely notice of appeal on June 15, 2001. See App. 21a-22a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court has consistently granted plenary review of decisions of three-judge courts involving the legality of the methodologies employed by the Census Bureau in conducting the apportionment count. See *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 445 (1992) (explaining that the Court had noted probable jurisdiction in a case challenging the constitutionality of the "method of equal

proportions" used to apportion representatives in Congress in light of "the importance of the issue and its significance in this year's congressional and presidential elections"); *Franklin* v. *Massachusetts*, 503 U.S. 788, 791 (1992) (explaining that the Court had noted probable jurisdiction and ordered expedited briefing in a case challenging the Census Bureau's decision to allocate federal employees living abroad to their "home of record" for apportionment purposes); *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 328 (1999) (explaining that the Court had noted probable jurisdiction in a case challenging the Bureau's proposed use of statistical sampling in the 2000 census). The questions presented here are of similar legal and practical significance, and surely are sufficiently substantial to warrant this Court's plenary consideration.

As a practical matter, the Bureau's policy and the decision below mean that Utah's representation in the House of Representatives has been improperly diluted by 25%, and its representation in the Electoral College diluted by roughly 17%. Thus, if the decision below stands, Utah and its approximately 2 million residents will be seriously under-represented in both of these bodies for the next decade.

Even more important, the opinion below resolves significant legal issues left open by this Court's earlier decision in *Franklin*. Without this Court's plenary consideration, the lower court's convoluted resolution of these issues will become the law of the land governing future congressional apportionment disputes.

As a result of that decision, for example, and as explained in Section I below, the Bureau is now authorized to treat overseas federal employees as a representative "sample" of all Americans living abroad, despite this Court's clear holding in *House of Representatives* that the Census Act bars the use of all statistical sampling techniques in the apportionment of Representatives. The lower court decision also purports,

under the authority of *Franklin*, to authorize the Bureau to discriminate among groups of Americans based on such arbitrary and non-textual factors as the relative "contributions" that those groups are making to their country. These applications of the Census Act and the Census Clause are simply too important – and too erroneous – for this Court to ignore.

As discussed in Section II, another troubling feature of the decision below is its extraordinarily crabbed interpretation of the "substantial burden" requirement of both the Religious Freedom Restoration Act and of this Court's free exercise decisions. Under the lower court's decision, federal agencies are now free to take any action that has a clear tendency to *discourage* religious exercise, as long as there is no plaintiff who can show that the discouragement was so strong, and his commitment to his religious belief so weak, that he actually *failed* to live up to that belief as a result of the agency's action. Such an approach would virtually destroy the protections for religious freedom enshrined in both the Constitution and RFRA, and therefore merits this Court's plenary consideration.

I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE PROPER APPLICATION OF THE CENSUS ACT AND THE CONSTITUTION'S CENSUS CLAUSE THAT WERE NOT RESOLVED IN *FRANKLIN* AND *HOUSE OF REPRESENTATIVES*.

In the last decade, this Court has reviewed four separate challenges to census-related rules under the Census Clause and the Census Act. See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999); *Wisconsin* v. *City of New York*, 517 U.S. 1 (1996); *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992); *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442 (1992). Although the Court has accorded a degree of deference to the federal government's decisions in this area, it has also rejected the

notion that census decisions are purely "political questions" outside the purview of proper judicial review. *Montana*, 503 U.S. at 456-59. In so doing, the Court has recognized constitutional and statutory standards that constrain governmental discretion in conducting the census.

In light of those standards, the lower court's analysis of Utah's claims is analytically deficient in at least four crucial respects. Those deficiencies arise out of the district court's failed attempt to distinguish overseas federal employees from LDS missionaries and other segments of the overseas population, as well as a basic misunderstanding of this Court's opinion in *Franklin*. Each of those errors, moreover, provides the Bureau with authority to manipulate the census in ways that are contrary to the Census Act, the Census Clause, and this Court's prior decisions.

1. First, in upholding the Bureau's decision to enumerate only a subset of the total overseas population, the district court reasoned in essence that overseas federal employees constitute a statistically representative sample of the entire overseas population. See App. 17a-18a. Specifically, the district court suggested that the Bureau's enumeration of this group, and the simultaneous exclusion of other similarly situated groups, including LDS missionaries, can be justified on the ground that "the distribution of federal overseas employees among the fifty states . . . does not present any extreme variations among the states." *Id.* at 17a.[8] "Thus," the district court concluded, "we do not have a situation where one state, or a group of states, is greatly advantaged or disadvantaged, compared to the remaining states, by the inclusion of its federal overseas employees." *Id.* at 18a.

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[8] The Bureau similarly argued that overseas federal employees are distinguishable from LDS missionaries because they "are distributed among the states in proportions approximately equal to the distribution of the population amongst the states nationwide." *See* DOJ Mem. at 31 n.12.

In making this assertion, however, the district court exposed a fatal weakness in its own reasoning as well as that advanced by the Bureau. To the extent the district court and the Bureau are correct in suggesting that overseas federal employees constitute a representative sample of the total overseas population, any decision to enumerate them on that basis runs afoul of the Census Act, 13 U.S.C. § 195, which expressly prohibits the use of statistical sampling in the apportionment count. See *House of Representatives*, 525 U.S. at 343.

Moreover, as four members of this Court observed in *House of Representatives*, the Census Clause's requirement that congressional apportionment be based on an "actual Enumeration" independently prohibits the use of sampling, or any other method of estimation, in the decennial census. See *id.* at 346-47 (Scalia, J., concurring, joined by Rehnquist, C.J., Kennedy, J., and Thomas, J.). That observation finds support in the fact that the Constitution prescribes "permanent & precise standard[s]" to govern the reapportionment of political power among the States in order to protect against political intransigence and manipulation. 1 *Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., rev. ed. 1966). For example, the Framers eschewed the notion of statistical sampling techniques in favor of the requirement of an "actual enumeration" to avoid giving "the party controlling Congress the power to distort representation in its own favor" by selecting "among various estimation techniques having credible (or even incredible) 'expert' support." *House of Representatives*, 525 U.S. at 348 (Scalia, J., concurring); see also *id.* at 343 (opinion of the Court by O'Connor, J.) (holding that the Census Act prohibits statistical sampling in calculating the apportionment population and declining to address the question whether the Constitution itself precludes such sampling). Actual enumeration, in other words, "may not be the most accurate way of determining population, but it may be the most accurate way of determining population with

minimal possibility of partisan manipulation." *Id.* at 348-49 (Scalia, J., concurring).

If the power to choose among "various estimation techniques" introduces an unacceptable "possibility of partisan manipulation," surely the discretion to count arbitrary subsets of the whole population is even more troubling. Indeed, if the Bureau may isolate the federal employee segment of the overseas population on the ground that it deems it politically or patriotically appropriate to do so, then other more blatantly partisan decisions to enumerate different segments of the population may logically follow.

By the same token, the district court's opinion disregards the fact that the Bureau's partial enumeration of the overseas population cannot be reconciled with the plain language of the Constitution and the Census Act. Instead of conducting an "actual Enumeration" of the "whole number of persons" in the relevant overseas "population," as required under the Constitution (U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2) and the Census Act (13 U.S.C. § 141(a)), the Bureau attempted to estimate an arbitrary subset of that population. Indeed, of all Americans residing abroad, including employees working in the private sector, missionaries performing religious service, volunteers providing charitable work, and countless others, only those employed by the federal government were counted as a relevant part of the "population."

The court below acknowledged that the Bureau had made no attempt to enumerate the "whole number of persons" that constitute the overseas "population." See App. 12a. Yet the court, like the Bureau itself, made no effort to reconcile the Bureau's partial count with the applicable statutory and constitutional language. Nor could it have done so. There simply is no plausible understanding of the word "population" or the phrase "whole number of persons in each State" that would limit those terms to persons employed by the federal government.

2. Similarly doubtful is the district court's attempt to justify the Bureau's preferential treatment of overseas federal employees on the basis that they are supposedly easier to identify and enumerate than most other Americans living overseas. See App. 18a (asserting that "federal overseas employees are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas"). This purported distinction fails for at least three reasons.

First, it has no basis in the text of either the Census Clause or the Census Act. If the Bureau believes that federal overseas employees are part of the "population of the United States" for purposes of the Census Act, then so too are LDS missionaries and other Americans living abroad who retain the same kinds of ties to their home States. To be sure, some portions of this overseas "population" may be practically impossible to count, just as some portions of the domestic population defy enumeration. But the Bureau has never claimed that all Americans living abroad other than federal employees are impossible to count. It simply refuses to count *anyone* other than federal employees, even if other Americans abroad could be counted just as easily, and even if they retain the same kinds of ties to their home States.

Second, to the extent that overseas federal employees should be included in the decennial census because they are easy to identify and allocate to their respective States, so too should LDS missionaries. Indeed, undisputed evidence in this case shows that LDS missionaries maintain close ties to their home States, return to their home States immediately upon completing their service overseas, and can be allocated accurately to their respective home States by reference to existing records. ASUF ¶ 30, at 19, ¶¶ 54-56, at 25-26. In fact, the records that could be used to allocate LDS missionaries to their respective States are arguably more

reliable than those the Bureau uses to allocate overseas federal employees, inasmuch as the "home of record" information used to allocate the latter can be many years out of date. See ASUF ¶ 20, at 16.

Third, to the extent the district court's reasoning can be read to suggest that LDS missionaries should be excluded from the decennial census because they comprise a small segment of the total overseas population, or because their distribution among the States does not mirror that of the domestic resident population, the same objections apply with equal force to overseas federal employees. See Utah Reply at 42-44. While the latter certainly comprise a significant portion of all Americans residing abroad, they still represent a relatively small component of the total overseas population, which, as the district court noted, is estimated to consist of three to ten million persons. See App. 12a n.6. Also, although they may be distributed differently than LDS missionaries, overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population, the distribution of which differs significantly from that of the domestic resident population. See ASUF ¶¶ 33-42, at 20-22.

It therefore follows that, if LDS missionaries must be excluded from the apportionment count, as the district court concluded, App. 12a-14a, and as the Bureau maintains, see DOJ Mem. at 28, so too must overseas federal employees. The Bureau's decision to enumerate only the latter defies any logical explanation, and therefore does not bear the requisite "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin*, 517 U.S. at 20.

3. By the same token, the district court was wrong to conclude that overseas federal employees are somehow entitled to special treatment in the apportionment count because of the supposed "involuntariness of their overseas posting, at the behest of their government." App. 17a. Once

again, there is no textual basis for any such distinction. If overseas federal employees are part of the "population" that the Bureau must attempt to count pursuant to the Census Act, then so too are other Americans living abroad who retain similar or greater ties to their home States. The Bureau cannot avoid counting the latter simply because they may not be serving abroad "involuntarily, at the behest of their government."

Conversely, if non-federal employees living abroad are *not* part of the pertinent "population" that must be "enumerated," then neither are overseas federal employees. And neither the Census Act nor the Census Clause allows them to be counted merely because they are serving their country. Neither the Bureau nor the district court has ever come to grips with this fundamental textual problem.[9]

The district court's discussion of this point was based on an unduly expansive reading of *Franklin*, which apparently stemmed from a passing reference in the *Franklin* opinion to the circumstances that sometimes lead to an overseas assignment. See 505 U.S. at 793. But that reference was in no way crucial to the Court's holding, and cannot be read to bestow any special status or entitlement on overseas federal employees. Indeed, such a conclusion would seem to violate the most basic notions of equal protection.

To understand the troubling implications of the district court's assertion to the contrary, one need only consider whether the Bureau could lawfully choose to limit the enumeration of the domestic population to individuals employed by the federal government. While it could certainly be said that federal employees (both in the United States and

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[9] Perhaps the Bureau or the district court was attempting to define overseas federal employees as a single relevant "population" under the Census Act, 13 U.S.C. § 141(a). But this approach fares no better, inasmuch as the statutorily relevant "population" is the "population *of the United States*" and of each individual State. *Id.* (emphasis added).

overseas) (a) perform valuable service to their country, (b) are sometimes assigned to work in places where they would not otherwise choose to live, and (c) can in many instances be identified more easily than other members of the population, it defies reason to suggest that the Bureau could fulfill its statutory and constitutional duties to conduct an "actual Enumeration" of the domestic "population" by limiting the census of that population to persons employed by the federal government. The district court's conclusion is equally implausible in the context of the overseas population.

4. Finally, the district court was wrong to suggest that Utah's claims are affirmatively precluded by this Court's opinion in *Franklin*. See App. 17a-18a. As indicated above, *Franklin* did not address the question at issue here: whether the Bureau's partial enumeration of the overseas population – and its simultaneous exclusion of all other segments of that population – can be reconciled with the Census Clause. *Franklin* merely rejected one narrow constitutional objection to the enumeration of overseas federal employees—the argument that the Apportionment Clause requires "physical presence in the United States." 505 U.S. at 804. Contrary to the district court's analysis, this narrow holding cannot be read broadly to immunize the Bureau's current practice of counting federal employees residing outside the United States, but excluding other groups of overseas Americans.

In fact, *Franklin* strongly supports Utah's claims. In *Franklin*, this Court explained that it is appropriate to add to the apportionment count Americans residing temporarily overseas who "consider themselves to be usual residents of the United States." *Id.* at 806. The Court also noted that counting such persons "does not hamper the underlying constitutional goal of equal representation" and in fact "promotes equality." *Id.* Finally, the Court even indicated that a decision to exclude such persons from the census could implicate the Census Clause by preventing "the votes of all those who reside in [a particular] State" from being "weighted

equally to votes of those who reside in other States." *Id.* If anything, then, *Franklin* itself undermines the Bureau's refusal to enumerate individuals residing temporarily overseas who, like LDS missionaries, maintain close ties with their home States and can be enumerated and allocated to their respective States by reference to existing records.

The district court, moreover, made no attempt to answer any of the most vexing questions raised by its own incomplete analysis of these issues. For example, the district court provided no analysis about the *degree* to which the enumeration of one component of the overseas population may inure to the benefit or detriment of "one state, or a group of states," App. 18a, without implicating the Census Clause or the Census Act. Similarly, the court stopped short of explaining why overseas federal employees are such a "unique subset of Americans abroad," *id.* at 17a, that the Bureau can make significant efforts to include them in the decennial census, while making no attempt to enumerate other identifiable components of the overseas population. In short, the district court failed to provide the kind of guidance called for in cases that, like this one, will have broad, precedent-setting impact on future censuses.

Appellants do not fault the district court for failing to provide such guidance, for that is the role this Court traditionally has played. But especially in light of the Bureau's policy and the district court's opinion, such guidance is sorely needed now. For that reason, and for all of the other reasons discussed above, the questions presented are sufficiently substantial to require this Court's plenary consideration of this case.

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE PROPER INTERPRETATION OF THE "SUBSTANTIAL BURDEN ON RELIGION" INQUIRY UNDER THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE.

The district court's analysis of the missionary plaintiffs' religious liberty claims also raises a substantial federal question worthy of this Court's review. Indeed, the district court's approach to determining whether the Bureau's discriminatory policy poses a "substantial burden on religion" would make it virtually impossible for anyone to invoke either the Religious Freedom Restoration Act or the First Amendment's Free Exercise Clause.

In addressing the religious liberty claims in this case, the panel acknowledged that "missionary work is one of the most basic and important obligations of the LDS faith." App. 10a (internal quotation marks omitted); see also ASUF ¶¶ 54-60, at 25-26 (summarizing evidence establishing the importance of missionary work in the LDS belief system, and describing the extent to which LDS missionaries are similarly situated to overseas federal employees). Without disputing that, as a direct result of their decision to act in conformity with their religious beliefs, LDS missionaries serving overseas were excluded from the 2000 census, the panel concluded that the plaintiffs had failed to establish that the Bureau's actions imposed any burden on the free exercise of religion. See App. 10a-11a. Specifically, the panel noted the absence of any evidence showing that any of the missionary plaintiffs "was even aware of the upcoming census when [they] decided to serve" missions, or that any of them knew that the Bureau's "failure to enumerate [missionaries residing overseas] would have any effect at all on the apportionment of House of Representative seats to Utah." *Id.* at 10a.

In essence then, the district court concluded that the Bureau's discriminatory enumeration policy imposes no

substantial burden on religious exercise because there is no evidence that the policy actually prevented any of the missionary plaintiffs from serving missions, or caused them to consider abandoning their plans to serve. In this respect, the district court's opinion completely misconstrues the substantial burden inquiry.

It is well settled, both under RFRA and under the Free Exercise Clause, that government action imposes a substantial burden on religion whenever it has a "*tendency* to coerce individuals into acting contrary to their religious beliefs." *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988)). As this Court noted in *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987), "[w]here the state . . . denies . . . a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 141 (emphasis in original omitted).[10]

Just such a burden is presented here: the Bureau's discriminatory policy clearly "denies a benefit" (an additional congressional seat) "because of conduct mandated by religious belief" (missionary service). Thus, although the

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[10] Recent amendments to RFRA make clear that a substantial burden can exist even when the practice at issue is not "mandated" by or "central" to the person's religious beliefs. As amended, RFRA now defines the term "religious exercise" to include any "exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(b) (emphasis added). This definition, found in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub. L. 106-274, 42 U.S.C. § 2000cc-1 *et seq.* (signed into law Sept. 22, 2000), is explicitly incorporated into RFRA through 42 U.S.C. § 2000bb-2, which states that "the term 'exercise of religion' [under RFRA] means religious exercise, as defined in section 2000cc-5 of this title."

burden on religion "may be indirect," it "is nonetheless substantial."

Accordingly, the fact that the LDS missionary plaintiffs here were not (and could not have been) aware that their discriminatory exclusion from the census would make a distributive difference in the apportionment count is irrelevant. The courts have made clear that it is the character of the government action – and its tendency to compel *others* to act contrary to religious belief – that burdens religion. See *Mockaitis* v. *Harclerod*, 104 F.3d 1522, 1533 (9th Cir. 1997) (holding that the government substantially burdened religion by secretly tape recording a prisoner's confession to a Roman Catholic priest); see also generally *Everson* v. *Board of Educ.*, 330 U.S. 1, 16 (1947) (the government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

Discriminatory actions like those of the Bureau therefore violate RFRA whether they are known (and thereby compel a choice) or unknown (and thereby inflict a substantial burden in secret). Any other rule would reward the government for concealing the practical effect of religious discrimination until the opportunity to avoid its consequences had passed. And any other rule would, ironically, provide protection from such discrimination only to those whose religious convictions are lukewarm.

This analysis confirms that RFRA's "substantial burden" requirement bears little resemblance to the unreasonably stringent standard articulated by the district court. A plaintiff need not show that a government policy will force or has forced individuals to act contrary to their religious beliefs. Rather, a substantial burden can be established for purposes of RFRA upon a showing that a government policy makes religious observance more difficult in a manner that *tends* to coerce individuals to disregard their religious duty.

Obviously, the fact that something has a particular tendency does not mean that this tendency will necessarily be strong enough to produce a certain result. See, *e.g.*, *Black's Law Dictionary* 1467 (6th ed. 1990) (defining "tend" as to "serve, contribute or conduce in some degree or way"); *Webster's New Universal Unabridged Dictionary* 1879 (2d ed. 1979) (defining tendency as an "inclining or contributing influence"). In fact, in a number of cases plaintiffs have refused to act contrary to their religious beliefs to secure a governmental benefit, yet this Court has concluded that the choice the government imposed on these believers constituted a substantial burden on religion. See *Hobbie*, 480 U.S. at 140-41 (Sabbatarian refused to work on Saturdays despite the State's insistence that such failure would disqualify her from participation in the State welfare program); *Sherbert* v. *Verner*, 374 U.S. 398, 403-04 (1963) (same); *Thomas* v. *Review Bd. of Employment Sec. Div.*, 450 U.S. 707, 715-18 (1981) (Jehovah's Witness refused to produce armaments despite resulting denial of welfare benefits).[11]

Under the district court's decision, by contrast, federal agencies will be free to take any action that has a tendency to discourage religious exercise as long as there is no plaintiff

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[11] Indeed, RFRA was enacted to restore the broad protections for religious liberty that existed as a matter of constitutional law before this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). RFRA expressly reinvigorates (as a matter of federal statutory rather than constitutional law) the pre-*Smith* free-exercise case law, including *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). *See, e.g.*, 42 U.S.C. § 2000bb(b); *City of Boerne* v. *Flores*, 521 U.S. 507, 515 (1997); *Werner* v. *McCotter*, 49 F.3d 1476, 1479 (10th Cir. 1995). Accordingly, the pre-*Smith* and post-*Smith* free exercise case law is instructive in its explanation as to what constitutes a substantial burden for purposes of RFRA. RFRA's standard is at least as favorable to religion as the post-*Smith* constitutional cases and, to the extent that the pre-*Smith* cases are more favorable to religion, RFRA explicitly adopts their standard. The district court's ruling is erroneous because it fails to reflect that fact.

who can show that the discouragement was so strong, and his commitment to his religious belief so weak, that the agency's action made him fail to live up to that belief.[12] That approach would eviscerate the protections for religious freedom enshrined in both the Constitution and RFRA. Accordingly, this aspect of the district court's decision raises a substantial question that merits this Court's review.

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[12] The speciousness of the district court's analysis is further illustrated by a hypothetical. Assume that Congress enacts legislation imposing a federal voter registration procedure under which voters can register only during personal visits by government registrars to voters' homes. The agency charged with administering the law directs the registrars to conduct the visits only on Saturday mornings, but creates an exception for federal government workers, allowing them to register at their workplace during normal business hours. Undoubtedly, such a policy would impose a substantial burden on the religious liberties of people who, for religious reasons, are occupied with religious services on Saturday mornings. Nevertheless, under the district court's analysis, such people would be unable to obtain relief unless they could show that the policy would lead them to forgo their weekly worship services. Such a result is patently at odds with this Court's religious liberty jurisprudence, and with common sense.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse the judgment of the district court.

Respectfully submitted,

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Building
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 14, 2001

APPENDIX A

UNITED STATES DISTRICT COURT,
D. UTAH,
CENTRAL DIVISION.

No. 2:01CV0023B.

STATE OF UTAH; MICHAEL O. LEAVITT, GOVERNOR; OLENE S. WALKER, LIEUTENANT GOVERNOR; MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL; L. ALMA MANSELL, PRESIDENT OF THE UTAH SENATE; MARTIN R. STEPHENS, SPEAKER OF THE UTAH HOUSE; MIKE DMITRICH, UTAH SENATE MINORITY LEADER; RALPH BECKER, UTAH HOUSE MINORITY LEADER; ORRIN G. HATCH, UNITED STATES SENATOR; ROBERT F. BENNETT, UNITED STATES SENATOR; JAMES V. HANSEN, MEMBER OF CONGRESS; CHRISTOPHER B. CANNON, MEMBER OF CONGRESS; JAMES MATHESON, MEMBER OF CONGRESS; BLAKE J. RUSSON; MICHAEL WAYNE ANDERSEN; BRENT MCGHIE; JEAN MCGHIE,

Plaintiffs,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE; WILLIAM G. BARRON, DIRECTOR, UNITED STATES CENSUS BUREAU, DEFENDANTS, STATE OF NORTH CAROLINA; MICHAEL F. EASLEY, GOVERNOR; BEVERLY PERDUE, LIEUTENANT GOVERNOR; ROY COOPER, NORTH CAROLINA ATTORNEY GENERAL; MARC BASNIGHT, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; JAMES BLACK, SPEAKER OF THE NORTH CAROLINA HOUSE; PATRICK BALLENTINE, NORTH CAROLINA SENATE MINORITY LEADER; LEO DAUGHTRY, NORTH CAROLINA HOUSE MINORITY LEADER; JESSE HELMS, UNITED STATES SENATOR; JOHN EDWARDS, UNITED STATES SENATOR; EVA M. CLAYTON, MEMBER OF

CONGRESS; BOB ETHERIDGE, MEMBER OF CONGRESS; WALTER B. JONES, MEMBER OF CONGRESS; DAVID PRICE, MEMBER OF CONGRESS; RICHARD BURR, MEMBER OF CONGRESS; J. HOWARD COBLE, MEMBER OF CONGRESS; MIKE MCINTYRE, MEMBER OF CONGRESS; ROBIN HAYES, MEMBER OF CONGRESS; SUE MYRICK, MEMBER OF CONGRESS; T. CASS BALLENGER, MEMBER OF CONGRESS; CHARLES H. TAYLOR, MEMBER OF CONGRESS; MELVIN L. WATT, MEMBER OF CONGRESS,

Intervenors.

April 17, 2001.

Before STEPHEN H. ANDERSON, Circuit Judge, DEE V. BENSON, Chief District Judge, and DAVID K. WINDER, District Judge.

MEMORANDUM OPINION

STEPHEN H. ANDERSON, Circuit Judge.

By constitutional and statutory mandate, the federal decennial Census is conducted, on behalf of Congress, by the Secretary of Commerce who has, in turn, delegated responsibility for conducting the Census to the Director of the Census Bureau. The "number of persons in each State" enumerated by the Director in each Census is used, inter alia, to apportion among the states seats in the United States House of Representatives.

In the 2000 decennial Census, the Census Bureau included within its enumeration for apportionment purposes federal employees living overseas, primarily military personnel and their dependents, but excluded all other Americans living overseas. Among those not enumerated were approximately 11,000 missionaries for the Church of Jesus Christ of Latter-day Saints ("LDS") who were overseas from the state of Utah

on eighteen-month or twenty-four-month proselytizing or service missions for their church on Census Day 2000 (April 1, 2000). As a result of the apportionment count calculated on the basis of Census 2000, the State of North Carolina, not the State of Utah, was awarded the 435th seat in the House of Representatives.

Plaintiffs, the State of Utah, its governor, and numerous other elected officials, along with four Utah citizens who were abroad serving as LDS missionaries on Census Day 2000, brought this suit against the Secretary of Commerce and the Director of the Census Bureau for injunctive and declaratory relief, asserting that the Census Bureau's failure to enumerate LDS missionaries living abroad, while including within its enumeration federal employees living abroad, violated various constitutional and statutory provisions. The State of North Carolina and numerous of its elected officials intervened in this action.

This three-judge panel of the United States District Court was convened pursuant to plaintiffs' request under 28 U.S.C. § 2284. Plaintiffs filed a motion for summary judgment. Defendants filed a motion to dismiss or, alternatively, a cross-motion for summary judgment. Intervenors filed a cross-motion for summary judgment. All parties have filed responsive pleadings, along with affidavits and other supporting materials. Defendants have filed an administrative record ("A.R.").

We may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). For the following reasons, we grant defendants' and intervenors' cross-motions for summary judgment, and we deny plaintiffs' motion for summary judgment.

BACKGROUND

The decennial Census is conducted pursuant to the requirement imposed by Article I of the United States Constitution and the Fourteenth Amendment that seats in the United States House of Representatives be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2; U.S. Const. art. I, § 2, cl. 3. The "counting" of the "number of persons in each State" is accomplished by "actual Enumeration," conducted every ten years, "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3; *Franklin v. Massachusetts*, 505 U.S. 788, 791, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992).

Congress, by means of the Census Act, 13 U.S.C. §§ 1-196, has delegated to the Secretary of the Department of Commerce the responsibility to "take a decennial census of population . . . in such form and content as he may determine." 13 U.S.C. § 141(a). The Secretary is assisted in that endeavor by the Director of the Census Bureau who "shall perform such duties as may be imposed upon him by law, regulations, or orders of the Secretary." 13 U.S.C. § 21. The Supreme Court has acknowledged that "the text of the Constitution vests Congress with *virtually unlimited discretion* in conducting the decennial" Census and such wide discretion commands extraordinary deference. *Wisconsin v. City of New York*, 517 U.S. 1, 19, 116 S.Ct. 1091, 134 L.Ed.2d 167 (1996) (emphasis added). Thus, the Secretary's conduct of the Census must "bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20, 116 S.Ct. 1091; *see also United States Dep't of Commerce v. Montana*, 503 U.S. 442, 464, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992) (noting that Congress's "apparently good-faith choice of a method of

apportionment of Representatives among the several States 'according to their respective Numbers' commands far more deference" than state districting decisions).

Under the Census Act, "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress . . . shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. § 141(b). Upon receipt of the Secretary's report, the President:

> shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions.

2 U.S.C. § 2a(a). The Clerk of the House of Representatives then sends to "the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b). With respect to Census 2000, the Secretary of Commerce delivered the Census 2000 data to the President on December 28, 2000, and the President, in turn, transmitted the counts to the Clerk of the House of Representatives on January 4, 2001. The Clerk notified Utah of its number of representatives on January 16, 2001.

In conducting the Census, the Census Bureau allocates people to their home states according to their "usual residence." "The term can mean more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Franklin*, 505 U.S. at 804, 112 S.Ct. 2767. However, the term has "continued to hold broad connotations." *Id.* at 805, 112 S.Ct. 2767. The Census Bureau defines it as "the place where a person lives and sleeps most of the time." A.R. at 651.

As the Census Bureau did in the 1970 Census and the 1990 Census, it decided, following various meetings, discussions, hearings, and reports, to enumerate in Census 2000 only those Americans living overseas who were employed by the federal government.[1] For apportionment purposes, federal employees living abroad were allocated to particular states in accordance with their "home of record," as designated in their personnel records. Federal employees living abroad were only counted in Census 2000 for apportionment purposes. As all parties agree, only the resident count (excluding all Americans living overseas, including federal employees) is used for purposes of redistricting, allocating federal funding, and other non-apportionment purposes. Following Census 2000, Utah retained the same number of seats in the House of Representatives that it had before the Census, while North Carolina was awarded an additional seat.

Plaintiffs brought this action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the All Writs Act, 28 U.S.C. § 1651; the Administrative Procedure Act, 5

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[1] In 1996, the Census Bureau formed a Census 2000 Contingency Committee on Americans Abroad, which produced a report called "Census 2000 Contingency Plan for Enumerating Private U.S. Citizens Overseas." A.R. at 642-55. The Bureau met with various organizations representing Americans living overseas, who urged the Bureau to enumerate all of those Americans. The Bureau ultimately decided not to enumerate those Americans. In a memorandum dated September 28, 1998, the Census Bureau explained its decision as based on the following considerations: data quality (the difficulty in verifying the citizenship and "home of record" of Americans abroad); resource issues (worldwide enumeration of American citizens would be costly in terms of "money, time, staff, equipment, [and] office space"); legal/policy issues (it is difficult to apply the Census Bureau's "usual residence" concept to those whose usual residence is outside the United States); and operational issues (worldwide enumeration of American citizens would require coordination with the State Department and private organizations and entities and would require massive worldwide publicity campaign). A.R. at 1013-15.

U.S.C. §§ 701-706 ("APA"); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 ("RFRA"); 2 U.S.C. § 2a; the Census Act, 13 U.S.C. §§ 1-196; the Apportionment Clause, U.S. Const. art. I, § 2, cl. 3; the First Amendment; the Fourteenth Amendment; and the Equal Protection Clause of the Fifth Amendment. They argue that LDS missionaries overseas are similar in all relevant respects to federal employees overseas, and they therefore seek a declaratory judgment that "the Census Bureau's disparate treatment of similarly-situated citizens" violates the APA, RFRA, Title 2, and the Census Act, as well as the Apportionment Clause and the First, Fourteenth and Fifth Amendments to the Constitution. Pls.' Second Am. Compl. for Declaratory and Injunctive Relief at 18-19. They also seek "an injunction requiring Defendants to apply the 'usual residence' rule to the temporarily absent LDS missionaries who were undercounted in the 2000 census, or, in the alternative, . . . an injunction requiring Defendants to remove the other temporarily absent citizens from the apportionment count." *Id.* at 19. As indicated above, the result which plaintiffs seek by these proposed remedies would be an order requiring the Census Bureau to either include LDS missionaries in the apportionment count, or exclude all federal overseas employees from the apportionment count, thereby giving Utah an additional representative seat and denying North Carolina such a seat.

DISCUSSION

We begin by noting that, as plaintiffs' counsel conceded at the hearing on the motions for summary judgment, plaintiffs have not pursued their equal protection argument. We therefore do not address that issue. We turn, therefore, to the remaining three claims.

I. APA Claim

Plaintiffs seek to challenge as arbitrary and capricious under the APA the Census Bureau's conduct in connection with Census 2000. To satisfy the statutory standing requirements of the APA, plaintiffs "must establish that defendants took 'final agency action for which there is no other adequate remedy in court.'" *Colorado Farm Bureau Fed. v. United States Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir.2000) (quoting 5 U.S.C. § 704). "Whether federal conduct constitutes final agency action within the meaning of the APA is a legal question." *Id.* The Supreme Court's decision in *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) forecloses plaintiffs' APA claim.

In *Franklin*, Massachusetts challenged the apportionment determination following the 1990 Census, in which federal overseas employees were counted, and which resulted in Massachusetts' loss of a Congressional seat. A three-judge panel of the district court held that the inclusion of such federal overseas employees was arbitrary and capricious under the APA. On appeal, the Supreme Court reversed, holding, with respect to Massachusetts' APA claim, "[b]ecause it is the President's personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge." *Franklin*, 505 U.S. at 799, 112 S.Ct. 2767. Because the President is not an agency, there was no statutory standing to challenge the apportionment under the APA. That decision controls, and we are unpersuaded by plaintiffs' attempts to distinguish *Franklin*.[2]

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[2] Plaintiffs attempt to distinguish *Franklin* by arguing that they are not simply challenging the decision to include federal overseas employees in the apportionment count, as Massachusetts did in *Franklin*, but rather "the discriminatory policy of including such employees while at the same time *excluding*—and refusing even to gather reliable data on—similarly situated individuals temporarily living abroad." Pls.' Reply Mem. at 78.

II. RFRA and First Amendment Free Exercise Claims

Plaintiffs [3] argue that the Census Bureau's exclusion of LDS missionaries from the apportionment count, while including federal employees overseas, violated both RFRA and the Free Exercise Clause of the First Amendment because it burdened the exercise of their religious practice of serving on missions abroad. We disagree.

Under the Free Exercise Clause, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly *tailored to advance that interest.*" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. t. 2217, 124 L.Ed.2d 472 (1993) (citations omitted). However, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531, 113 S.Ct. 2217. Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a); *see also Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001).[4]

However, *Franklin* itself refutes this distinction. The *Franklin* majority explicitly noted that the President "is not expressly required to adhere to the policy decisions reflected in the Secretary's report." *Franklin*, 505 U.S. at 799, 112 S.Ct. 2767. It is the President's ability to "reform the census" and revisit the Secretary's policy decisions that makes the Secretary's report to the President "more like a tentative recommendation than a final and binding determination." *Id.* at 798, 112 S.Ct. 2767. The President had that ability following Census 2000, no less than he did in *Franklin* with respect to the 1990 Census.

[3] Plaintiffs concede that only the four LDS missionary plaintiffs have standing to bring their RFRA and Free Exercise claims.

[4] While *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), held RFRA unconstitutional as applied to the states, the Tenth Circuit recently held that RFRA remains constitutional and applicable to the federal government. *See Kikumura*, 242 F.3d at 959-60.

Thus, both causes of action require a demonstration that the Census Bureau's decision as to which groups of overseas Americans to enumerate burdened plaintiffs' exercise of religion. *See Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C.Cir.2000) ("To sustain its claim under either the Constitution or [RFRA], [plaintiff] must first establish that its free exercise right has been substantially burdened.").

Plaintiffs allege, and we accept their assertion as true, that missionary work "is one of the most basic and important obligations of the LDS faith." Worthen Decl. at 2. Only one of the four LDS missionary plaintiffs has filed an affidavit in support of their motion for summary judgment. Plaintiff Michael Wayne Anderson's affidavit states that he was away from Utah serving a two-year mission on April 1, 2000, and that he sincerely believes that "performing missionary work . . . is one of my most important obligations as a member of the LDS Church." Anderson Aff. § 4.

The question, however, for purposes of RFRA and the Free Exercise Clause, is whether the Census Bureau's decision not to enumerate non-federal-employee Americans abroad on April 1, 2000, in any way burdened, or even tended to burden or coerce, Mr. Anderson's free exercise of his religious belief in the performance of missionary work. Plaintiffs present no evidence at all that it did. Mr. Anderson's affidavit does not mention the Census, nor indicate that he was even aware of the upcoming Census when he decided to serve his mission. Moreover, at the time Mr. Anderson decided to serve his mission, he did not know, nor could he know, whether the Census Bureau's failure to enumerate him would have any effect at all on the apportionment of House of Representative seats to Utah.

In sum, plaintiffs present nothing more than conclusory and completely speculative allegations that their practice of religion or religious beliefs were burdened in any way by the Census Bureau's decision not to enumerate LDS missionaries

who were abroad on Census Day 2000. Conclusory allegations are insufficient to withstand summary judgment. We therefore grant summary judgment to defendants and intervenors on plaintiffs' RFRA and Free Exercise claims.

III. Apportionment Clause and Census Act Claims

As indicated, the Apportionment Clause of the Constitution, as amended by the Fourteenth Amendment, requires an "actual Enumeration" of the "whole number of persons in each State." U.S. Const. amend. XIV, § 2; U.S. Const. art. 1, § 2, cl. 3. The Census Act requires a "decennial census of population." 13 U.S.C. § 141(a). Plaintiffs argue that the Census Bureau violated these requirements when it included in Census 2000 only a small subset of the entire American overseas population (those who work for the federal government) while excluding similarly situated Americans overseas (LDS missionaries).

Plaintiffs' second amended complaint seeks one of two injunctive remedies for these alleged violations: either include LDS missionaries in the apportionment count, or exclude federal overseas employees.[5] Plaintiffs seek a declaration that the Census Bureau must treat all "similarly situated" overseas Americans alike. We explore each claim in turn.

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[5] In their reply brief, plaintiffs attempted to broaden the remedy they sought to include the following possibility: "the addition of all overseas Americans, including LDS missionaries, who can be counted using existing administrative records similar to those used to count federal employees." Pls.' Reply Mem. at 3. However, as their counsel acknowledged at the summary judgment hearing, they did not seek this broader relief in their second amended complaint, nor have they sought to further amend their complaint. Counsel accordingly acknowledged, as he must, that plaintiffs are bound to seek only the relief sought in their latest complaint.

A. Inclusion of LDS missionaries

Plaintiffs argue that, if federal overseas employees are counted in the apportionment count, LDS missionaries must be as well because they are similarly situated to federal overseas employees. They argue that *Franklin* holds that the Census Bureau must include any group of overseas Americans that, like federal employees overseas, retains ties to particular states and can in fact be reliably counted. We disagree.

As *Franklin* made clear, the "constitutional goal" underlying the Apportionment Clause is "equal representation." *Franklin*, 505 U.S. at 806, 112 S.Ct. 2767. We accordingly evaluate the propriety of the Census Bureau's exercise of the broad discretion granted it in apportionment decisions with that goal in mind.

All parties agree that we do not know with any certainty the number and distribution of non-federal-employee Americans living overseas at any particular time. Kenneth Prewitt, the Director of the Census Bureau at the time, estimated in 1999 that there were five million such Americans. A.R. at 1200.[6] Thus, it is indisputable that the 11,159 LDS missionaries from Utah were a very small proportion of the total universe of non-federal-employee Americans abroad for various reasons on April 1, 2000. However, of all LDS missionaries abroad on April 1, 2000 (24,251), a hugely disproportionate number of them (46%) were abroad from Utah. *See* Swensen Aff., Ex. A.

Plaintiffs would have us now direct the Census Bureau to enumerate, out of the entire universe of non-federal-employee Americans abroad on April 1, 2000, only LDS missionaries, a course of action which would overwhelmingly favor Utah vis-a-vis all forty-nine other states. Given that the goal of

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[6] He noted, however, that estimates varied from three million to ten million. A.R. at 1200.

apportionment is "to achieve a fair apportionment *for the entire country*," *United States Dep't of Comm. v. Montana*, 503 U.S. 442, 464, 112 S.Ct. 1415, 118 L.Ed.2d 87 (1992) (emphasis added), commanding the enumeration of one group from one state obviously fails to further the constitutional goal of "equal representation." Indeed, inclusion of one such group to the clear advantage of one state would seem to undermine another goal of the Apportionment Clause, which is distributive accuracy. *See Wisconsin*, 517 U.S. at 20, 116 S.Ct. 1091 ("[A] preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, viz., to determine the apportionment of the Representatives among the States."). Moreover, were we to direct the Census Bureau to enumerate only LDS missionaries, we can easily envision constitutional challenges to that decision from other groups of Americans abroad for religious or other purposes, including students studying abroad, employees of companies with overseas offices, retirees, and numerous other groups who are overseas for charitable, humanitarian, or any number of other reasons.[7]

Were we to declare that any group of American citizens temporarily abroad, with ties to a particular state and an apparent intention to return to that state, could offer itself up

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[7] The concurring opinion misapprehends our basis for reaching this conclusion. It assumes that LDS missionaries are similarly situated to overseas federal employees, and that, as a result, the disproportionate distribution is irrelevant. This overlooks the fact that LDS missionaries, a tiny fraction of the entire overseas population of five million or so, are not so similarly situated for several reasons, including the very fact that such missionaries are so disproportionately distributed among the states. As indicated in the text, distributive accuracy and proportionality are important goals of the Census. *See Wisconsin*, 517 U.S. at 20, 116 S.Ct. 1091; *Montana*, 503 U.S. at 464, 112 S.Ct. 1415. Accordingly, inclusion of a single group which so clearly and dramatically distorts distributive accuracy, to the benefit of one state, is impermissible.

for enumeration and the Census Bureau must enumerate them, we would be compelled to require that the decennial census conducted in 2000 be retaken.[8] As plaintiffs' counsel conceded at the summary judgment hearing on this case, that is a practical, if not an actual, impossibility and a remedy which plaintiffs admittedly do not seek. We therefore deny plaintiffs' request to require the Census Bureau to enumerate LDS missionaries who were abroad on April 1, 2000.

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[8] As the record in this case indicates, there are a host of well-documented problems with attempting to enumerate all Americans living abroad. *See* n. 1, *supra*. Additionally, on June 9, 1999, Kenneth Prewitt, the Director of the Bureau of the Census, gave a prepared statement before the Subcommittee on the Census, Committee on Government Reform, United States House of Representatives ("Prewitt Statement"). He reported that the Census Bureau had concluded, after careful review and study, that "it cannot credibly enumerate the population of American citizens living abroad." Prewitt Statement at 2. He listed the following problems in trying to enumerate those Americans overseas: obtaining accurate data, particularly without a control mechanism to permit follow-up for nonrespondents, which would effectively make a census of Americans overseas voluntary and therefore subject to manipulation; validation and verification of information obtained, including preventing duplication and identifying the home state; operational complexity; and cost.

Were we to adopt plaintiffs' suggestion that the Census Bureau can use the records of private organizations like the LDS Church, we discern additional problems in identifying and applying criteria to evaluate the reliability of such records. Although the LDS Church asserts it keeps meticulous records about its overseas missionaries, in order to discharge its own independent obligation to conduct the census, the Census Bureau would nonetheless have to develop some way of verifying the reliability of the information contained in such records. If we compel the Census Bureau to proceed in that direction, it will encounter multiple problems attempting to verify the records of myriad private organizations, each with different records and record-keeping practices and capabilities, in addition to inconsistencies relating to the willingness of such organizations to identify themselves, cooperate, and not mount challenges among themselves, the various states, and the Census Bureau.

B. Exclusion of federal overseas employees

Plaintiffs' alternative remedy for their claimed Apportionment Clause/Census Act violation is to have us order the Census Bureau to exclude all federal overseas employees and their dependents from the apportionment count derived from Census 2000. Such a remedy would entail requiring the Census Bureau to recalculate the apportionment count for all fifty states and resubmit that count to the President. We conclude that a fair reading of *Franklin* precludes that remedy.

In *Franklin*, Massachusetts challenged the Census Bureau's policy of including overseas federal employees in the apportionment count on the ground that doing so "violated the command of Article I, § 2, cl. 3, that the number of Representatives per state be determined by an 'actual Enumeration' of 'their respective Numbers,' that is, a count of the persons 'in' each State." *Franklin*, 505 U.S. at 803, 112 S.Ct. 2767. The inclusion of overseas federal employees for apportionment purposes had resulted in Massachusetts actually losing a representative seat. The Supreme Court rejected Massachusetts' challenge on its merits:

> In this case, the Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress. . . . The Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality.

Id. at 806, 112 S.Ct. 2767.

Plaintiffs argue they are not challenging simply the inclusion of federal overseas employees; rather, they are challenging the inclusion of those individuals with the simultaneous refusal to include a group (LDS missionaries) whom they argue is similarly situated in all relevant respects to federal overseas employees. They argue that distinguishes this case from *Franklin*. We disagree.

It is true that the Court in *Franklin* was specifically presented only with the question of whether the Census Bureau acted rationally and consistently with the constitutional goal of equal representation when it decided to include for apportionment purposes federal employees overseas. It was not explicitly presented with another group of Americans abroad claiming to be similarly situated to federal employees and seeking on that basis to be enumerated.[9] However, the Court obviously knew that federal employees were not the only group of Americans abroad, and that, by enumerating them, the Census Bureau only enumerated a subset of Americans abroad. Thus, it was implicit in *Franklin* what is explicit here: federal employees overseas are one subset of the entire universe of overseas Americans. We conclude that, for several reasons, with respect to their request that we require the Census Bureau to exclude from the apportionment count federal overseas employees, plaintiffs cannot distinguish this case from *Franklin*.

First, plaintiffs interpret *Franklin* to stand simply for the proposition that, if there is a group of overseas Americans

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[9] The very same argument plaintiffs make (that the Census Bureau could not include American federal overseas employees while excluding other non-federal-employee Americans overseas) was made in *Borough of Bethel Park v. Stans*, 449 F.2d 575 (3rd Cir.1971). The court rejected that argument, holding it was a proper exercise of the Census Bureau's discretion in conducting the 1970 Census to enumerate federal employees overseas but not other groups of Americans abroad.

that have retained ties to a particular state or states and are countable, they must be enumerated for apportionment purposes. Moreover, they argue *Franklin* did not *require* the inclusion of federal overseas employees. So, the argument goes, we are not *compelled* to include them. We do not read *Franklin* in that limited a way. In *Franklin*, the enumerated group happened to be federal employees, and the Court did note that the Census Bureau rationally concluded that they retained ties to particular states and could be dependably counted.

Although those two factors are important, however, the Court did not rely on those two features alone when it upheld the Census Bureau's enumeration of those employees. Rather, the Court acknowledged that federal employees are a unique subset of Americans abroad. It noted that there were several reasons why the Census Bureau decided to include them for apportionment purposes. Not only was there bipartisan Congressional support for inclusion of such employees, but also there was a belief that such employees "should not be excluded from apportionment counts because of temporary and involuntary residence overseas." *Franklin*, 505 U.S. at 793, 112 S.Ct. 2767 (quotation omitted). The involuntariness of their overseas posting, at the behest of their government, differentiates most federal employees from most non-federal employees living overseas.

Second, the Court expressly stated that inclusion of federal employees for apportionment purposes "does not hamper the underlying constitutional goal of equal representation." *Id.* at 806, 112 S.Ct. 2767. Federal overseas employees come from all fifty states, and presumably are apportioned throughout the entire fifty states. Moreover, the evidence presented in this case indicates that, while the distribution of federal overseas employees among the fifty states does not precisely mirror the distribution of resident state populations, it also does not present any extreme variations among the states.

Thus, we do not have a situation where one state, or a group of states, is greatly advantaged or disadvantaged, compared to the remaining states, by the inclusion of its federal overseas employees.[10] Inclusion of federal employees, unlike the inclusion of various other groups of private American citizens abroad, does not invite the kind of manipulation by states or the injection of local or parochial bias which the founders wished to avoid.

Third, even if inclusion of federal overseas employees causes a different apportionment than would a count of only the resident population, that is not necessarily a constitutional violation. Indeed, that is precisely what happened in the *Franklin* case: Massachusetts lost a seat when the federal overseas count was added to the resident count for apportionment purposes. Thus, *Franklin* makes clear that it is constitutionally permissible if the federal employee overseas count does not mirror the resident count, and it is constitutionally permissible if inclusion of such employees for apportionment purposes actually affects the apportionment of representatives.

Finally, federal employees overseas are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas. It has access to records maintained in the ordinary course of business by the government with respect to the government's own employees. As the evidence presented in support of the summary judgment motions indicates, there is simply no other group which can be as readily identified and dependably counted as federal employees overseas.

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[10] Thus, the dramatic advantage to Utah, alone among the fifty states, which would follow from the inclusion of LDS missionaries, stands in stark contrast to the much more modest proportional divergences between the federal employee overseas count and the resident count.

In sum, *Franklin* held that the Secretary of Commerce's decision to enumerate federal employees overseas was "consonant with, though not dictated by, the text and history of the Constitution." We cannot say that the same decision made for Census 2000 was anything other than a rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes. Accordingly, we decline plaintiffs' request to require the Census Bureau to exclude federal overseas employees from the apportionment count.

For the foregoing reasons, we GRANT the defendants' and intervenors' motions for summary judgment and DENY the plaintiffs' motion for summary judgment. The clerk is directed to enter judgment accordingly.

BENSON, District Judge, Concurring.

I concur in Sections I and II of the majority opinion and in the result reached in Section III. I write separately because in my view the discussion in Section III goes too far. The only finding necessary to our decision is that the Census Bureau had a rational basis for the manner in which it carried out the 2000 Census, and therefore did not abuse its discretion in deciding not to count any overseas Americans beyond U.S. government employees. That is all we need say, and any analysis should be limited to that issue. In dicta, however, the majority opinion reaches issues removed from and unnecessary to our holding.

In Section III, the majority unnecessarily discusses possible problems with the remedies sought by the plaintiffs. I see no reason to express an opinion on these remedies because we have already determined there is no liability. For example, the majority suggests that there may be something wrong with the inclusion of LDS missionaries in the census because Utah has more LDS missionaries serving abroad than other states. This dictum is unnecessary to our decision. Furthermore, I

disagree with it. If for some reason in the future the census takers determine to include overseas LDS missionaries, which in their discretion they may choose to do for a variety of reasons, I see nothing constitutionally or otherwise impermissible in doing so merely because a large number of them are from Utah. In this regard, I find it significant that the inclusion of overseas government employees does not precisely mirror the domestic count for apportionment purposes. Indeed, the only reason the plaintiffs filed *Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), was because the inclusion of military personnel favored Washington over Massachusetts, with the former gaining a congressional seat and the latter losing one for that reason alone. Yet the United States Supreme Court found no error in that practice. Similarly, I see no legal significance in the fact that the possible inclusion of overseas LDS missionaries in future censuses may give a proportionately greater count to Utah than to other states.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

[Filed 15 Jun. 01]

Case No. 2:01-CV-23B

STATE OF UTAH, *et al.*
Plaintiffs,

v.

EVANS, *et al.*
Defendants.

NOTICE OF APPEAL

Mark L. Shurtleff USB #4666
UTAH ATTORNEY GENERAL
Raymond A. Hintze USB #1501
Chief Civil Deputy Attorney General
J. Mark Ward USB #4436
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone 801-538-1191
Facsimile 801-538-1121

Thomas R. Lee USB #5991
1395 E. Canberra Dr.
Lindon, Utah 84042
Telephone 801-378-9024
Facsimile 801-378-5893

Gene C. Schaerr
Micheal S. Lee USB #8108
SIDLEY AUSTIN BROWN
& WOOD
1722 Eye St. NW
Washington, DC 20006
Telephone 202-736-8000
Facsimile 202-736-8711

Pursuant to 28 U.S.C. §§ 1253 and 2101(b), Plaintiffs hereby appeal to the United State Supreme Court from the Judgment and Memorandum Opinion and Order entered by this Court on April 17, 2001.

RESPECTFULLY SUBMITTED this 15th day of June, 2001.

/s/ Raymond A. Hintze

Mark L. Shurtleff
Attorney General of Utah
Raymond A. Hintze
Chief Civil Deputy Attorney General
J. Mark Ward
Assistant Attorney General

Thomas R. Lee
1395 E. Canberra Dr.
Lindon, Utah 84042
801-378-9024

Gene C. Schaerr
Micheal S. Lee
SIDLEY AUSTIN BROWN
& WOOD
1722 Eye St., NW
Washington, DC 20006
202-736-8000

APPENDIX C

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 2, cl.3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. XIV, §§ 1-2

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

APPENDIX D

STATUTES

13 U.S.C. § 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

* * * *

(Aug. 31, 1954, c. 1158, 68 Stat. 1019; Aug. 28, 1957, Pub.L. 85-207, § 9, 71 Stat. 483; Dec. 23, 1975, Pub.L. 94-171, §§ 1, 2(a), 89 Stat. 1023, 1024; Oct. 17, 1976, Pub.L. 94-521, § 7(a), 90 Stat. 2461.)

13 U.S.C. § 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

(Added Pub.L. 85-207, § 14, Aug. 28, 1957, 71 Stat. 484, and amended Pub.L. 94-521, § 10, Oct. 17, 1976, 90 Stat. 2464.)

42 U.S.C. § 200bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub.L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

42 U.S.C. § 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

(Pub.L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489; Pub.L. 106-274, § 7(a), Sept. 22, 2000, 114 Stat. 806.)

42 U.S.C. § 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub.L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489; Pub.L. 106-274, § 7(b), Sept. 22, 2000, 114 Stat. 806.)

OCT 15 2001
OFFICE OF THE CLERK

No. 01-283

In the

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees,

and

STATE OF NORTH CAROLINA, *et al.*,

Intervenor-Appellees.

On Appeal from the United States District Court for the District of Utah

MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS

ROY COOPER
North Carolina Attorney General
Tiare B. Smiley,* Special Deputy Attorney General
James Peeler Smith, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900
Attorneys for Intervenor-Appellees

October 15, 2001

**Counsel of Record*

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the three-judge court erred in following *Franklin v. Massachusetts*, 505 U.S. 788 (1992), by holding that the Census Bureau may enumerate federal employees overseas for apportionment purposes, even though it is not practicable to enumerate the other millions of Americans abroad, and by concluding that the inclusion of LDS missionaries would dramatically distort the apportionment count to the benefit of one state contrary to the constitutional purpose of the census?

2. Whether the three-judge court erred in finding that plaintiffs failed to produce any evidence that the Census Bureau's decision not to count the LDS missionaries living overseas imposed a substantial burden on their right to the free exercise of their religion under either the First Amendment or the Religious Freedom Restoration Act?

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MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Intervenor-Appellees State of North Carolina, *et al.*, move that this Court summarily affirm the Order[1] of the three-judge United States District Court for the District of Utah, dated April 17, 2001, or in the alternative, dismiss the appeal on the ground that the questions raised by the appeal are so insubstantial as to require no further argument. The Order on appeal is based on well-settled principles previously established by this Court, and there is no conflict which requires this Court's resolution.

COUNTER-STATEMENT OF THE CASE

A. STATEMENT OF THE CASE

Appellants in this action are the State of Utah, its governor, congressional delegation and various other elected officials, and four Utah citizens who were serving abroad on Census Day 2000 (April 1, 2000) as missionaries of the Church of Jesus Christ of Latter-Day Saints (hereinafter "LDS"). Appellants brought this action to challenge the apportionment count which resulted from the 2000 decennial census (hereinafter "Census 2000"). Complaint, p. 2.[2] Specifically,

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[1] The Order sought to be reviewed appears in the Appendix to Appellants' Jurisdictional Statement (hereinafter "J.S. App.") at 1a and is reported at 143 F. Supp. 2d 1290 (D. Utah 2001).

[2] The appellants' complaint appears in the Appendix to the federal appellees' Motion to Affirm or, in the Alternative, to Dismiss at 1a.

appellants sought an order directing the Secretary of Commerce and Director of the Census Bureau

> to include within the final apportionment calculation those missionaries of the LDS Church who, like other Utahns and Americans serving abroad in the military or other federal service, were temporarily absent from their usual residence at the time of the census. Alternatively, the Complaint seeks an injunction requiring Defendants to remove the other temporarily abroad citizens from the apportionment count.

Complaint ¶ 3. *See also* N.C. App.[3] at 7a-8a. It was only in their summary judgment reply brief that appellants suggested the alternative of counting all Americans temporarily living overseas. At oral argument, however, appellants conceded that it would not be possible to enumerate all Americans temporarily overseas. *See* N.C. App. at 10a-13a.

North Carolina rather than Utah was certified to receive the 435th seat in the United States House of Representatives based on the apportionment count. Utah contends had federal employees living overseas not been counted or had overseas LDS missionaries been counted, she would have received the 435th seat. Intervenors are the State of North Carolina, its governor and congressional delegation, and various other

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[3] The Appendix to North Carolina Intervenor-Appellees' Motion to Affirm or, in the Alternative, to Dismiss will be referenced herein as "N.C. App.".

elected officials. They intervened in this action to protect North Carolina's entitlement to the 435th seat in the House of Representatives.

Appellants brought this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the All Writs Act, 28 U.S.C. § 1651; the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4 ("RFRA"); 2 U.S.C. § 2a; the Census Act, 13 U.S.C. §§ 1-196; the Apportionment Clause, U.S. Const. art. I, § 2, cl. 3; the First Amendment; the Fourteenth Amendment; and the Due Process and Equal Protection Clauses [*sic*] of the Fifth Amendment. Complaint, p. 2. At the hearing of this matter, appellants abandoned their equal protection argument. N.C. App. at 8a-9a. This left three claims to be addressed by the three-judge panel: plaintiffs' APA claim, their RFRA and First Amendment Free Exercise Claims, and their Apportionment and Census Act claims.

The three-judge panel dealt easily with the first two of these claims. With regard to appellants' APA argument, the court, relying on *Franklin v. Massachusetts*, 505 U.S. 788 (1992), determined that it is the President's personal transmittal of the apportionment report to Congress that constitutes the final action on the apportionment, and because the President is not an agency, appellants have no standing to challenge the apportionment under the APA. J.S. App. at 8a. The court specifically rejected appellants' attempt to distinguish *Franklin* on the grounds that they were challenging "the discriminatory policy of including [federal overseas employees and military personnel and their dependents] while at the same time

excluding - - and refusing to even gather reliable data on - - similarly situated individuals temporarily living abroad." J.S. App. at 8a n.2. The court held that such a challenge is foreclosed by *Franklin* itself, which notes that it is the President's power to reject or alter the policy decisions made by the Secretary of Commerce with regard to the census and apportionment that renders his decision, and not that of the Census Bureau or the Secretary, the final, binding determination under the APA. *Id.*

The court disposed of plaintiffs' RFRA and First Amendment Free Exercise claims just as easily. The court, while accepting as true the appellants' assertions that missionary work "is one of the most basic and important obligations of the LDS faith," J.S. App. at 10a, accurately found that appellants had failed to present even a scintilla of evidence that the free exercise of religious beliefs of any plaintiff was in any way burdened or tended to be burdened, substantially or otherwise, by the Census Bureau's decision not to enumerate non-federal-employee Americans abroad on Census Day 2000. *Id.* Indeed, appellants conceded at the hearing of this matter that they had no such evidence. N.C. App. 13a. Without any evidence of a tendency to burden, much less an actual substantial burden, plaintiffs failed to carry their burden of proof on their RFRA and First Amendment claims.

With regard to the Apportionment Clause and Census Act claims, the three-judge panel noted that appellants argued that all similarly situated overseas Americans should be treated the same in the apportionment count, such that either LDS missionaries, as persons similarly situated to federal overseas personnel, should have been included in the apportionment

count or federal overseas employees should not have been included in the apportionment count. In assessing the first alternative, the court, again citing *Franklin*, noted that "the 'constitutional goal' underlying the Apportionment Clause is 'equal representation.'" J.S. App. at 12a (quoting *Franklin*, 505 U.S. at 806). It then stated that

> it is indisputable that the 11,159 LDS missionaries from Utah were a very small proportion of the total universe of non-federal-employee Americans abroad for various reasons on April 1, 2000. However, of all LDS missionaries abroad on April 1, 2000 (24,251), a hugely disproportionate number of them (46%) were abroad from Utah.[4]

J.S. App. at 12a. The court determined that, under these circumstances, inclusion of the LDS missionaries in the apportionment count "obviously fails" the constitutional goal of "equal representation" and of "a fair apportionment *for the entire country*." J.S. App. at 12a-13a (quoting *Department of Commerce. v. Montana*, 503 U.S. 442, 464 (1992)). Moreover, the majority of the court determined that the potential claims and constitutional challenges of other groups of Americans overseas if the court ordered inclusion of overseas LDS missionaries in the apportionment count would effectively

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[4] The majority of the three-judge panel rejected plaintiffs' basic assumption - - that LDS missionaries are "similarly situated" to overseas federal employees - - partially on the grounds of this disproportionate representation among states.

require that the census be completely retaken. J.S. App. at 13a-14a. For all of these reasons, the court held that the Census Bureau could not be ordered to include LDS missionaries overseas in the apportionment count.

With regard to appellants' assertions that the Apportionment Clause and the Census Act forbid inclusion of federal employees overseas in the apportionment enumeration if "similarly situated" persons - - such as LDS missionaries - - are excluded, the court found this case indistinguishable from *Franklin*. The court determined that the reasons underlying the decision in *Franklin* - - (1) that overseas federal employees are involuntarily absent from their usual homes at the direction of the federal government; (2) that inclusion of federal employees, unlike inclusion of LDS missionaries overseas, would not hamper the goal of equal representation; (3) that it is constitutionally permissible for the federal employees overseas count not to mirror the resident count and to affect the results of the apportionment count; and (4) that "there is simply no other group which can be as readily identified and dependably counted as federal employees overseas"[5] - - were equally applicable in this case. J.S. App. at 16a-18a. The court refused to require the Census Bureau to exclude federal overseas employees from the apportionment count.

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[5] The court did not, as appellants assert, fail "to come to grips" with the "fact" that enumeration of LDS missionaries can easily be accomplished by "reference to administrative records." J.S. App. at 12. Indeed, the court addressed this very contention, noting that the "administrative records" in question were records maintained by a private organization - - the LDS Church - - and that reliance upon such records by the Census Bureau would create numerous "additional problems in identifying and applying criteria to evaluate the reliability of such records." J.S. App. at 14a n.8.

For these reasons, the three-judge panel denied plaintiffs' motion for summary judgment and granted the federal defendants' and North Carolina intervenors' motions for summary judgment. J.S. App. at 19a. Timely notice of appeal was filed on June 15, 2001. J.S. App. at 21a-22a.

B. STATEMENT OF FACTS

The gravamen of appellants' complaint is the decision by the Census Bureau to count United States military and federal civilian employees (and their dependents living with them) serving abroad by using federal administrative records, but not to attempt to count the unknown millions of other Americans abroad for Census 2000, in particular LDS missionaries. In the process of planning for Census 2000, notice was given that the census would count the stateside resident population as well as Americans who were working overseas for the U.S. Government. *See e.g.*, 63 Fed. Reg. 24, 154 (May 1, 1998). This was the same census population counted in 1990 for purposes of apportionment, a count upheld by this Court as constitutional in *Franklin v. Massachusetts*, 505 U.S. 788. On June 9, 1999, the House Subcommittee on Census, Committee on Government Reform, held a hearing to address several census issues, including the Census Bureau's policy on counting Americans living and working overseas.[6]

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[6] Appearing at the subcommittee hearing were members of the Census 2000 Coalition, a group of organizations representing various constituencies of Americans living abroad who were lobbying Congress to pass legislation requiring the Census Bureau to develop and implement a methodology for counting all non-federally-employed Americans abroad. The group included the American Business Council of the Gulf Countries,

The subcommittee hearing and Administrative Record developed in this case document the impracticability and infeasibility of attempting to obtain an accurate and reliable count of the millions of Americans living abroad. The record showed:

- Previous attempts to count non-federally-employed Americans abroad were abysmal failures. A post-1970 census analysis of the overseas data revealed a significant undercount of private United States citizens differing "substantially from one geographic area to another and from one type of American citizen living abroad to another," "particularly in Canada and Mexico, where the under-enumeration probably exceeded 90 per cent." Admin. Record, p. 1207.

- The Census Bureau cannot accurately estimate the universe of the private overseas population. Within the U.S. border, there is a master address list of every habitable structure so that follow-up efforts to non-respondents -- by mail, by telephone and by personal visits -- can be made. No such list exists for private

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American Citizens Abroad, American Residents Overseas, Democrats Abroad, Republicans Abroad, and the Federation of American Women's Clubs Overseas. Neither the LDS Church, the State of Utah, nor Utah's congressional representatives contributed to the hearing or participated in the Coalition's lobbying efforts. The extensive Administrative Record developed by the Census Bureau on the issue of counting private American citizens overseas is devoid of any input from the LDS Church seeking inclusion of its missionaries serving abroad in the Census 2000 apportionment count. *See* Admin. Record, pp. 01156-01161; 01179-01239; 01274-01280; 01514-01529.

citizens overseas. Admin. Record, pp. 01038, 01160, 01199-01200, 01275-76.

- Estimates of Americans overseas range from three million to ten million, but the real number is unknown. Without the ability to follow up with non-respondents, any attempt to enlist overseas Americans to come forward and be counted converts the overseas census into a "voluntary" census, fundamentally different from the mandatory stateside census. Admin. Record, pp. 01038, 01200, 01207.

- There is no basis for presuming that the response pattern of a voluntary self-enumeration census by overseas Americans would be distributed proportionately among the States. A biased sample would distort the apportionment count, and a self-selected sample is a biased sample. Admin. Record, pp. 01200, 01207, 01210.

- The ease or difficulty of counting Americans in different countries could advantage or disadvantage particular States. For example, it is easier to count civilian Americans living in Saudi Arabia, who must carry passports and who often work for American firms, than it is to count Americans living in Canada, who are not required to have passports and often are retired. It can be assumed that many of the Americans who retired to Canada moved from northern border states such as Maine or Washington, while many who work in Saudi

> Arabia are from oil-producing states such as Texas or Oklahoma. To the extent the census counted a lower proportion of Americans abroad in Canada than in Saudi Arabia, the count would not be neutral with respect to congressional apportionment, and would introduce bias into the allocation of Representatives. Admin. Record, pp. 01038-39, 01200, 01280.

In addition to the extensive Administrative Record filed with the three-judge court by the federal appellees, North Carolina intervenors provided affidavits about some of the other large groups of Americans overseas temporarily who would have a claim for inclusion in the census count comparable to that of the LDS missionaries. *See* Affidavit of Rick W. Fleming (college students studying abroad) and Affidavit of Richard W. Brunson (other missionaries and organizations, not associated with the LDS Church, serving overseas).

As a result of the addition of military and civilian federal employees to the apportionment count, based on "home of record" designations in their personnel records, North Carolina was apportioned the 435th seat in Congress under the method of equal proportions. This increased North Carolina's congressional delegation to thirteen Representatives. Without the federal employees, Utah instead of North Carolina would have been allotted the 435th seat and her number of Representatives increased to four. It is unknown what effect an accurate count of all Americans abroad would have on the apportionment calculation.

ARGUMENT

I. THE DISTRICT COURT FOLLOWED ESTABLISHED PRECEDENTS OF THIS COURT IN UPHOLDING THE CENSUS BUREAU'S RATIONAL EXERCISE OF DISCRETION TO INCLUDE FEDERAL OVERSEAS EMPLOYEES IN THE APPORTIONMENT COUNT AND NOT ATTEMPT TO COUNT OTHER AMERICANS OVERSEAS.

The Census Bureau properly exercised its discretion in determining for purposes of Census 2000 to continue to count military and civilian federal employees serving overseas for purposes of apportionment, while declining to attempt the near impossible - - counting the unknown millions of private American citizens overseas. Contrary to Utah appellants' characterization of the issue, no decision was made *vis a vis* counting or not counting LDS missionaries. LDS missionaries are merely a small segment of the three to ten million Americans living overseas for religious, educational, business or other personal reasons. The Utah judges comprising the three-judge panel in this case correctly concluded, in accordance with well-established principles previously articulated by this Court, that the decisions made for Census 2000 were a "rational exercise" of the "discretion delegated to the Census Bureau to conduct its obligation to enumerate the population for apportionment purposes." J.S. App. at 19a.

A. LEGAL STANDARD FOR REVIEWING CENSUS DECISIONS.

Very little guidance is actually offered by the United States Constitution itself with respect to the Census. The Apportionment Clause is silent on the subject of counting citizens living abroad. Article I, section 2, clause 3, provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers." As amended by section 2 of the Fourteenth Amendment, this requires "counting the whole number of persons in each State." This "actual enumeration" of the number of persons in each State is to be calculated "in such Manner as [the Congress] shall by Law direct." U.S. Const., art. I, § 2, cl. 3. Pursuant to this provision, Congress has directed the Secretary of Commerce to conduct a census as of April 1 every tenth year "in such form and manner as he may determine." 13 U.S.C. § 141(a) (2000). The Census Act further provides that the Secretary may delegate the authority for establishing census procedures to the Census Bureau. 13 U.S.C. §§ 2,4 (2000). The Census Act also provides no guidance on the question of enumerating citizens living or working abroad.

In reviewing challenges under the Apportionment Clause and Census Act, this Court has concluded that despite the constitutional and statutory commitment of the form, content and manner of the census to Congress and the Executive Branch, decisions by Congress and the Secretary of Commerce concerning the census are not immune from judicial review. *See Montana*, 503 U.S. at 458-49; *Franklin*, 505 U.S. at 801. However, this Court also has recognized that while

technically reviewable, the exercise of judgment by Congress and the Secretary regarding complex census matters requires considerable deference. Because "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" Congress' conduct of the census commands great deference. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). "Through the Census Act, Congress has delegated its broad authority over the census to the Secretary [of Commerce]" and the Secretary's discretion "is commensurate with that of Congress." *Id.* at 19-20. This Court has established a deferential standard for reviewing the Census Bureau's conduct of the census "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the goal of equal representation,' it is within the limits of the Constitution." *Id.* at 19 (quoting *Franklin*, 505 U.S. at 804) (citation omitted). Based on the Constitution's broad grant of authority to Congress, the Secretary's decision on the conduct of the census, "need bear only a *reasonable relationship* to the accomplishment of an actual enumeration." *Id.* at 20 (emphasis added).

As a result of this highly deferential standard, the Supreme Court consistently has upheld the judgment of the Secretary of Commerce against constitutional challenges. *See Id.* at 23 (upholding Secretary's decision not to use a statistical adjustment to the census data as a "reasonable choice" in light of the wide discretion bestowed by the Constitution and Census Act); *Franklin*, 505 U.S. at 806 (upholding Secretary's judgment to allocate federal employees temporarily stationed overseas to their home states as consonant with, though not dictated by, the Constitution); 505 U.S. at 821 n.22 (Stevens,

J., concurring) (recognizing special problems in including overseas personnel in the census requires "difficult judgments" and wide "discretion [is] available to the Secretary").

B. THE ENUMERATION OF MILITARY AND FEDERAL CIVILIAN EMPLOYEES OVERSEAS HAS PREVIOUSLY BEEN AFFIRMED BY THIS COURT.

In *Franklin*, Massachusetts challenged the Census Bureau's decision to include overseas federal employees in the apportionment count, a decision which resulted in the shift of a congressional seat from Massachusetts to Florida after the 1990 census. This Court upheld the Census Bureau's policy of including federal employees assigned to duty overseas:

> [T]he Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress.

Franklin, 505 U.S. at 806. In affirming the judgment of the Census Bureau, this Court further concluded that including federal employees stationed abroad in the apportionment count "does not hamper the underlying constitutional goal of equal representation," but rather "actually promotes equality." *Id.* Although counting overseas federal employees is not required statutorily or constitutionally, because the inclusion of this

population promotes equality, it would have made no sense for the Census Bureau to reverse course for Census 2000 and exclude this finite population that can be accurately enumerated and allocated to the States based on the federal government's own administrative records.

Appellants seek reversal of *Franklin's* holding based on the absurd notion that the federal employee overseas population is a statistical sample prohibited by 13 U.S.C. § 195. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (interpreting 13 U.S.C. § 195 to prohibit the use of statistical sampling in the apportionment count). Appellants' complaint does not allege a cause of action under 13 U.S.C. § 195, although this argument was scantly presented to the lower court. On appeal this contention mistakenly has been expanded as a major theme in appellants' quest for further review.[7]

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[7] Throughout their Jurisdictional Statement, appellants not only characterize the federal overseas count as a form of "statistical sampling," but also suggest that the Census Bureau and the three-judge panel treated it as such. *See, e.g.* J.S. App. at (i) ("federal employees (a) constitute a reasonably representative sample of all Americans living abroad"); 2 ("the district court unjustifiably assumed that overseas federal employees are entitled to preferential treatment because they allegedly constitute a reasonably representative sample of all Americans living abroad"); 10 ("in response to the Bureau's assertion that overseas federal employees constitute a reasonably representative sample of total overseas population, Utah showed that a decision to enumerate them on that basis cannot be reconciled with the Census Act . . . which categorically prohibits the use of statistical sampling in the apportionment count"); 12 ("the district court failed even to acknowledge Utah's argument that, to the extent defendants are correct in suggesting that the federal employee segment of the overseas population can be considered a "representative sample" of the full overseas population, the Bureau's partial count is unlawful under the Census Act . . . as an impermissible attempt to introduce sampling in the apportionment

Sampling is a statistical notion using random selection from a population to extrapolate characteristics of the sample to the total population from which it is drawn. *See generally House of Representatives*, 525 U.S. at 22-26. The enumeration of federal overseas employees is not a statistical sample - - it is an exhaustive count of the entire known and finite universe of such employees. The lower court did not affirm the policy to include federal overseas employees based on the notion that this group of Americans was a "representative sample," as appellants mistakenly assert. Rather, the lower court correctly noted that this population comes from all fifty states, and that the distribution of this group among the fifty states, while not precisely mirroring the distribution of the resident state populations, "does not present any extreme variations among the states." J.S. App. at 17a. *See also* Declaration of Lara J. Wolfson (March 5, 2001), Exhibit B, N.C. App. at 1a (appellants' summary judgment exhibit illustrating that the federal overseas population for each state falls generally along

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count"); 14 ("the Bureau is now authorized to treat overseas federal employees as a representative 'sample' of all Americans living abroad"); 16 ("in upholding the Bureau's decision to enumerate only a subset of the total overseas population, the district court reasoned in essence that overseas federal employees constitute a statistically representative sample of the entire overseas population"); 17 ("To the extent the district court and the Bureau are correct in suggesting that overseas federal employees constitute a representative sample of the total overseas population, any decision to enumerate them on that basis runs afoul of the Census Act"); 18 ("the Bureau attempted to estimate an arbitrary subset of [the relevant overseas] population"); 20 ("overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population, the distribution of which differs significantly from that of the domestic resident population").

the resident population baseline with no unusual outliers). The lower court's discussion does no more than recognize this Court's holding in *Wisconsin*, which establishes "distributive accuracy" to be a core principle to apply in determining the accuracy of House apportionment. *See Wisconsin*, 517 U.S. at 20 ("the Secretary's decision to focus on distributive accuracy is not inconsistent with the Constitution. Indeed, a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, *viz.*, to determine the apportionment of the Representatives among the States"). Appellants deliberately misconstrue the Court's valid concern about distributive accuracy with statistical sampling.[8] The three-judge panel correctly followed this Court's decision in *Franklin* regarding the inclusion of federal overseas employees in the apportionment count.

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[8] The unwarranted expansion of appellants' sampling theory in this case is no doubt related to a second pending lawsuit by the same appellants challenging the Census Bureau's use of imputation in calculating the apportionment count as statistical sampling prohibited by 13 U.S.C. § 195, *see* J.S. at 2-3 n.1, a case which likely will result in an appeal to this Court. By attempting to create a non-existent "sampling" issue in this case, appellants are apparently attempting to mislead the Court into assuming that the two cases are related and it should refrain from summarily affirming this case until after the separate action, which directly raises a statistical sampling question under 13 U.S.C. § 195 and the Constitution, reaches the Court. This case, however, revisiting *Franklin's* treatment of federal overseas Americans is completely unrelated to the second pending action, which seeks to extend the prohibition on statistical sampling articulated in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, to the Census Bureau's long-standing practice of imputation.

C. INCLUSION OF LDS MISSIONARIES IN THE APPORTIONMENT COUNT WOULD VIOLATE THE CONSTITUTIONAL GOAL OF EQUAL REPRESENTATION.

Nine months after the conduct of Census 2000, and immediately after the announcement of the apportionment results, appellants ran to the courthouse claiming that Utah has a population of LDS missionaries serving overseas, which, if counted, would alter the reapportionment of Representatives so that Utah would acquire a fourth Representative and North Carolina would lose her newly allotted thirteenth Representative. Prior to Census 2000, the Utah plaintiffs and the LDS Church never sought a decision by the Census Bureau or Secretary of Commerce to include their overseas missionaries in the census enumeration. The three-judge panel properly concluded that such an *ad hoc* action would not further the constitutional goal of equal representation, and further, would undermine another goal of the Apportionment Clause, distributive accuracy. J.S. App. at 13a.

The Utah plaintiffs presented the court with an affidavit based on LDS Church records regarding the number of LDS missionaries from each state serving abroad at the time of Census 2000, along with their "permanent" or "home" states. *See* Affidavit of Robert P. Swensen, Exhibit A. These records showed 11,176 LDS missionaries from Utah and 107 LDS missionaries from North Carolina, although North Carolina's resident population is over eight million people, while Utah's

resident population is slightly more than two million people.[9] Thus, a hugely disproportionate number of LDS missionaries living abroad (46%), were from Utah. In contrast to the graph illustrating that the federal overseas population for each state falls generally along the resident population baseline, a graph of the distribution of LDS missionaries by state illustrates the disproportionate bias toward Utah created by this group of missionaries. *Compare* N.C. App. at 1a with N.C. App. at 3a (Second Affidavit of P. William Tillman, Jr., Exhibit D).

The three-judge court correctly concluded, under these circumstances, that the inclusion of overseas personnel from one religious group which would dramatically advantage one state would impermissibly undermine the constitutional goal of distributive accuracy. *See* J.S. App. at 13a n.7. The court also recognized the chaotic potential such a result could produce, with other groups of Americans abroad for religious or other purposes, including students, business persons, retirees, and numerous others overseas for charitable or humanitarian reasons, each coming forward in federal court making the same argument as the LDS missionaries. J.S. App. at 13a. These other groups could also claim close home-state ties and available administrative records, and offer themselves up for enumeration, without ever having presented themselves to the Census Bureau when Census 2000 was in the planning stages.

It was not feasible to count all non-federally employed Americans overseas for Census 2000, so the exercise of discretion by the Census Bureau *not* to count such overseas

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[9] North Carolina's resident population is 8,049,313; Utah's resident population is 2,233,169. *See* Second Affidavit of P. William Tillman, Jr., Exhibit A.

Americans, including LDS missionaries, was reasonable, is not required by the Constitution,[10] and is consistent with the goal of equal representation. *See* Argument D, *infra*. The lower court properly declined to intrude on the Secretary's exercise of discretion by allowing one state to manipulate the census enumeration in a manner which would so obviously distort the distributive accuracy of the apportionment count to the advantage of that state.

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[10] Appellants' suggestion that the Census Bureau augment the apportionment count by adding LDS missionaries based on LDS Church records raises additional concerns under the First Amendment's prohibition of establishment of religion as well as the Fifth Amendment's guarantee of equal protection. Requiring the Census Bureau to rely on LDS Church records for purposes of performing its duty to conduct the census would constitute a "fusion of governmental and religious functions" and an improper delegation or sharing with the LDS Church of the constitutional duty to conduct the census. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). The Establishment Clause also will not permit requiring the Census Bureau to include LDS missionaries in the apportionment count without also including other missionaries - - *e.g.* Baptists, Presbyterians, Roman Catholics, Lutherans, and members of non-denominational groups. Appellants seek preferential treatment for LDS missionaries which is prohibited by the Constitution. *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Similarly, the denominational preference sought for LDS missionaries risks violating the equal protection guarantees of the Fifth Amendment. *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-39 (1987) (distinctions made on religious grounds among religious groups are subject to strict scrutiny).

D. THE CENSUS BUREAU MADE A REASONED CHOICE CONSISTENT WITH THE CONSTITUTION NOT TO ATTEMPT TO COUNT ALL AMERICANS OVERSEAS AND APPELLANTS LACK STANDING TO CHALLENGE THAT DECISION.

In *Franklin*, this Court left open the possibility that the Secretary of Commerce and Census Bureau might, at some later point in time, permissibly conclude that it is practicable and feasible to enumerate all Americans overseas at the time of the census. When this Court concluded that the Constitution does not "dictate" counting Americans overseas, although the reasoned judgment to count federal employees serving overseas is "consistent" with the text and history of the Constitution, *Franklin*, 505 U.S. at 805, it knew full well that there were other Americans overseas who maintained ties to their home states who were not being counted. In this case, the federal appellees presented the lower court with an administrative record replete with practical and policy reasons why the time to count all Americans overseas has not yet come. *See, e.g.*, Statement of Facts, *supra* at 8-10.

Although the idea of counting all Americans was a late-blooming one for appellants - - it was not pled in their complaint - - they now rely heavily on it as an alternative theory. Appellants, however, lack standing to pursue the cause of counting all Americans overseas. The number of Americans living, working and traveling abroad, who maintain ties with their home states, is unknown. Appellants themselves suggested an overseas population of three to seven million, *see* Declaration of Lara J. Wolfson (5 March 2001) ¶ 15, while the Census Bureau and others estimate the number between three

and ten million, *see* Admin. Rec., p. 1200, 1207. Indeed, it appears obtaining an exhaustive and reliable count is simply not feasible. *See* Statement of Facts, *supra* at 8-10. Appellants themselves conceded to the three-judge panel that counting the universe of all Americans overseas is not practicable. *See* N.C. App. at 10a-13a.

Without a reliable and complete count of *all* Americans overseas, which includes designations of continuing ties to individual states, no one is in a position to establish which, if any, state or states would gain or lose Representatives as a result of adding such an enumeration to the apportionment count. Appellants cannot show a source of accurate data establishing or even *estimating* the unknown three to ten million Americans who were abroad at the time of Census 2000; consequently, they cannot show that Utah would gain an additional Representative if the apportionment of seats were done based on non-existent data.[11] The Utah appellants, similar to the Massachusetts plaintiffs in *Franklin*, therefore, lack standing to challenge the non-count of non-federally employed

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[11] North Carolina Intervenor-Appellees provided the lower court state-by-state data regarding the number of college students reported to be studying abroad. Utah appellants' expert devised a table which established three different distribution patterns among the states for overseas LDS missionaries, federal employees and college students if these populations were allocated back to their recorded home states. *See* Declaration of Lara J. Wolfson (March 5, 2001), Exhibit C. It is not possible, therefore, to predict from these separate patterns what the distributive pattern would be if all Americans overseas could be reliably counted. The only reasonable prediction is that there would be another separate and distinct distribution pattern among the states for this presently unknown population, and that pattern would be unlikely to match any of the other distributive patterns.

Americans abroad under the Constitution or the Census Act. 505 U.S. at 802.

While it is true that *Franklin* does not foreclose the Secretary's option to include in the apportionment count non-federally employed Americans living overseas who have maintained ties to their home states, such an attempt may "amount[ ] to a technical impossibility" since this population does not constitute a clearly defined and verifiable universe. Admin. Record, p. 01013. The Census Bureau recommended against a proposed law to count all private U.S. citizens abroad "because it is neither feasible nor practical to enumerate and allocate" this population to the States. *Id.* By contrast, the Census 2000 plan included the use of official administrative records to enumerate federally-affiliated U.S. citizens in the apportionment count "because their service - - and thus residence - - abroad is temporary and a condition of their employment with the government." *Id.* There is, however, "no definite, accurate and verifiable standard for enumerating the remaining category of U.S. citizens, that is, private citizens living abroad." *Id.* *See also* Statement of Facts, *supra* at 8-10.

The Constitution and *Franklin* would permit the future enumeration of all Americans abroad for apportionment purposes if, but only if, the count is reliable and unbiased. As the former Census Bureau Director testified before Congress when asked if it would be feasible to count all Americans overseas in 2010:

> If we started with some better sense of what the base population looks like and how they are distributed and what the quality of the

> administrative records are of universities who send many, many scientists abroad, churches who send many, many missionaries abroad and corporations who send many, many employees abroad and the retiree population who simply lives abroad . . . We need a map of the phenomena before we would be comfortable doing the level of job which we could come back and recommend to the Congress that it become a part of the apportionment counts.

Admin. Record, p. 01207. Because Congress has broad discretion in dictating the form and content of the census, the Utah plaintiffs, which include all of the State's Senators and Representatives, were uniquely situated during the preparations for Census 2000 to draw Congress' attention to the population of Americans living abroad, including LDS missionaries, who were not going to be counted and included in the apportionment count. Their *post hoc* complaints cannot support a finding based on this record that the Secretary of Commerce and Census Bureau made anything other than a reasonable judgment by deciding not to count all overseas Americans.

The test for reviewing this challenge to the Census Bureau's exercise of its discretion to determine the manner in which the census is conducted is whether the decision is "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, and bears "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census,"

Wisconsin, 517 U.S. at 20. Where several policy choices are open to the Census Bureau in the exercise of its "virtually unlimited discretion" to conduct the census, *id.* at 19, the lower court properly chose not to intrude into the decision as to those choices, in the absence of some discernable "single constitutionally permissible course," *Montana*, 503 U.S. at 463. *See also Bethel Park v. Stans*, 319 F. Supp. 971, 979 (W.D. Pa. 1970) ("[t]he mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau").

Appellants have conceded that attempting to count the unknown millions of Americans who were overseas at the time Census 2000 was conducted is not feasible. *See* N.C. App. at 11a. Without a reliable means of enumerating this population, bias in favor of certain states likely would result, *see* Statement of Facts, *supra* at 8-10, which would undermine the constitutional goals of equal representation and distributive accuracy. The decision not to enumerate private Americans overseas rested, at least in part, on a reasoned determination that there was no way to ensure for Census 2000 that any such count would be either numerically or distributively accurate. The three-judge court properly concluded that the decision to count federal overseas employees, but not to count all other Americans overseas, including LDS missionaries, was a rational exercise of the Secretary's and Census Bureau's discretion in meeting their obligation to enumerate the population for apportionment purposes.

II. THIS CASE PRESENTS NO QUESTION OF THE IMPOSITION OF A "SUBSTANTIAL BURDEN" ON THE FREE EXERCISE OF RELIGION, EITHER UNDER THE FIRST AMENDMENT OR THE RELIGIOUS FREEDOM RESTORATION ACT.

The Bureau's decision not to count Americans living overseas except for federal personnel imposes no substantial burden on the right of LDS missionaries to the free exercise of their religion. The decision, therefore, violates neither the RFRA, 42 U.S.C. § 2000bb (2000), nor the Free Exercise Clause of the First Amendment. The LDS petitioners, however, would have RFRA extended to restrict not only governmental actions that *actually* impose a substantial burden on the exercise of a religious practice, but also actions which might have "'a tendency to coerce individuals into acting contrary to their religious beliefs.'" J.S. at 25, citing *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450-51 (1988)), *cert. denied*, 519 U.S. 821 (1996). Petitioners' expansion of RFRA contradicts the plain language of the Act and misinterprets this Court's holdings regarding burdens on the free exercise of religion in violation of the First Amendment.

"The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner of Internal Revenue,* 490 U.S. 680, 699 (1989). RFRA provides in pertinent part that "Government shall not

substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a) (2000). The decisions of this Court are replete with cases discussing governmental actions that were found or not found to be substantial burdens on the practice of religion. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (upheld statute banning religion-based polygamy); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (upheld Sunday closing law burdening Orthodox Jews); *Sherbert v. Verner*, 374 U.S. 398 (1963) (struck denial of unemployment benefits to Seventh Day Adventist who worshiped on Saturdays); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (struck denial of unemployment benefits to Jehovah's Witness who quit job because of his anti-war religious scruples against producing armaments); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (struck denial of unemployment benefits to Seventh Day Adventist who quit job because religious beliefs prevented her from working on Saturdays); *Bowen v. Roy*, 476 U.S. 693 (1986) (upheld governmental use of social security number contrary to Native American religious belief); *United States v. Lee*, 455 U.S. 252 (1982) (upheld social security taxes contrary to Amish religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upheld logging and road building on land sacred to Native Americans); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (upheld statute banning peyote usage even for sacramental purposes).

Petitioners conceded at the hearing in the court below that they had not produced any evidence that any LDS

missionary weighed his not being counted in the census against his duty to answer the call for service as a missionary in another country. N.C. App. at 13a. They proffered only the declaration of Plaintiff Michael Wayne Anderson, who testified that he had "recently completed a two-year mission for the LDS Church in Maracaibo, Venezuela," and that "performing missionary work . . . is one of [his] most important obligations as a member of the LDS Church." N.C. App. at 5a. (Anderson Declaration ¶¶ 2, 4); J.S. App. at 10a. He did not state that he considered his being counted or not counted in the census in deciding whether to perform his church mission. Petitioners now contend that the imposition of an unknown burden is sufficient to meet the requirements of RFRA. They say, "Any other rule would reward the government for concealing the practical effect of religious discrimination." J.S. at 26. This argument fails for at least two reasons. First, that the Bureau would not count non-federal personnel living overseas for an indefinite period of time was well known, at least since *Franklin* was decided by this Court in 1992. Despite the lobbying of other overseas advocacy groups, as noted above, the Bureau made it clear well in advance of Census 2000 that it would not count persons who were not federal personnel living overseas. Second, there was no religious discrimination by the Bureau - - all non-federal personnel were treated alike. Persons living abroad for religious reasons were treated no differently from those who were abroad for business, educational, charitable, or other personal reasons. The decision not to count non-federal personnel was truly a neutral rule of general applicability. *Compare Church of the Lukumi Babalu Ave., Inc. v. City of*

Hialeah, 508 U.S. 520 (1993) (facially neutral ordinance not neutral in intent or practice).

But, irrespective of whether the Bureau's policy of counting only federal personnel was known by persons contemplating LDS missionary service, the policy did not impose a substantial burden on them. To violate either the First Amendment or RFRA, a government policy must impose a substantial burden on the free exercise of a person's religious beliefs. The fact that a person's missionary service might possibly affect a state's representation in Congress is simply too attenuated to be considered a substantial burden on the free exercise of one's religion.

The decision of the court below in finding that there was no evidence of any governmental action imposing or tending to impose a burden on the right of LDS missionaries to practice their faith, was consistent with the holdings of this Court. Consequently, there was no violation of either RFRA or the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the motion to affirm or, in the alternative, to dismiss should be granted.

Respectfully submitted,

ROY COOPER
North Carolina Attorney General

Tiare B. Smiley*
Special Deputy Attorney General

James Peeler Smith
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900

Attorneys for Intervenor-Appellees

**Counsel of Record*

October 15, 2001

APPENDIX

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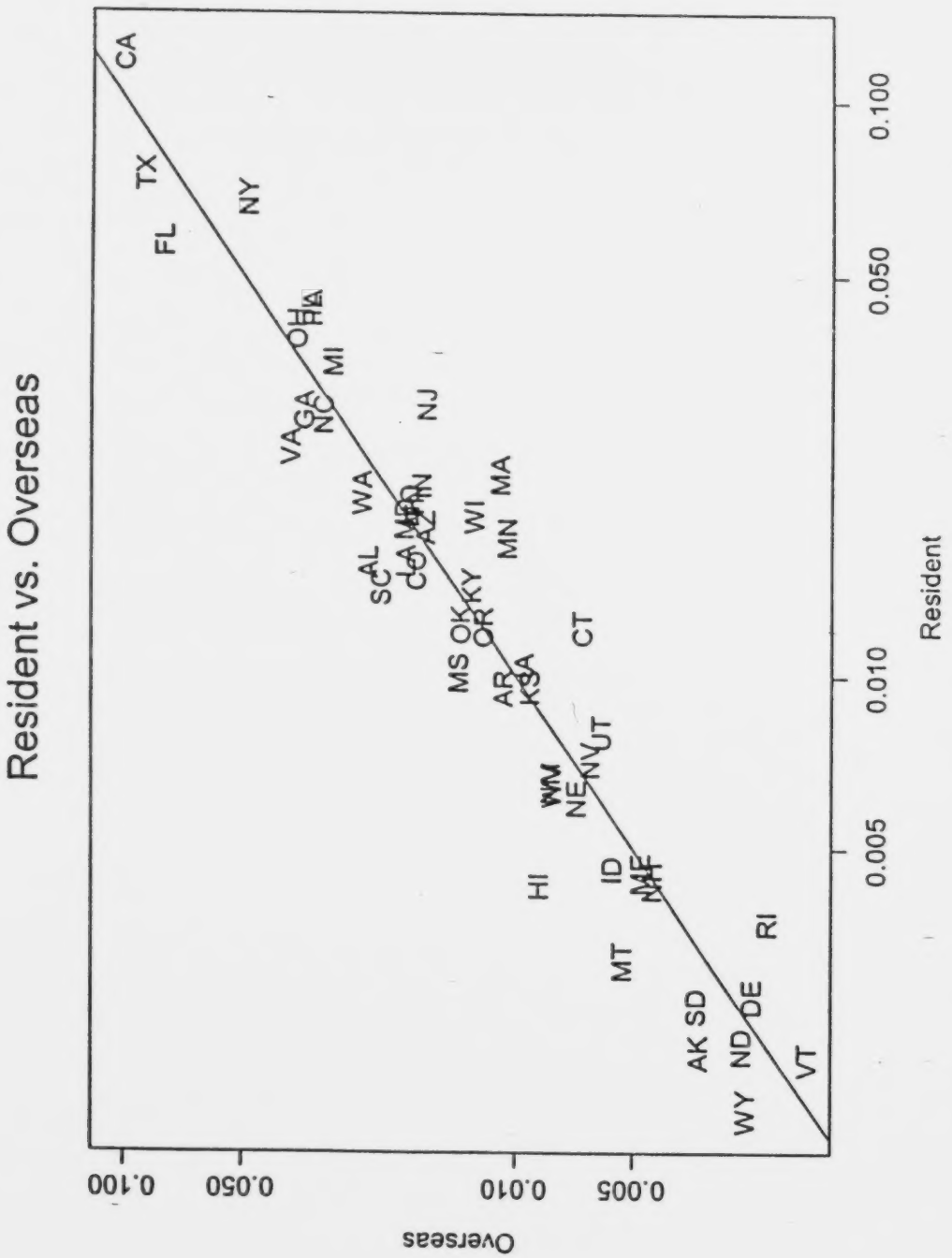
DECLARATION OF LARA J. WOLFSON (MARCH 5, 2001)
EXHIBIT B



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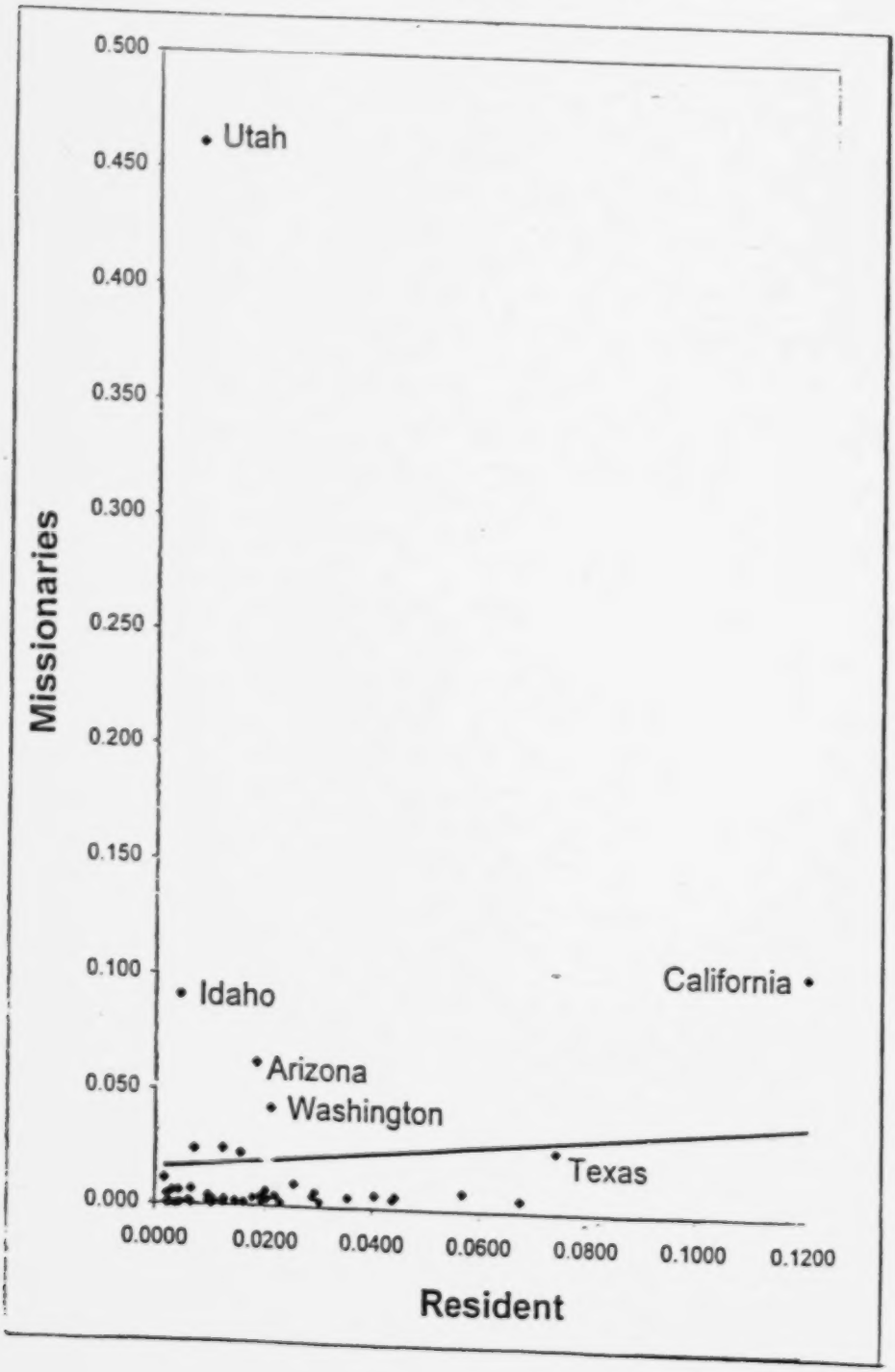
SECOND AFFIDAVIT OF P. WILLIAM TILLMAN, JR.
EXHIBIT D



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DECLARATION OF MICHAEL WAYNE ANDERSON [CAPTION OMITTED FOR PRINTING]

I, Michael Wayne Anderson, do hereby declare the following:

1. I am a lifelong member of the Church of Jesus Christ of Latter-day Saints (the "LDS Church" or "Church"), and a permanent resident of the State of Utah.

2. I recently completed a two-year mission for the LDS Church in Maracaibo, Venezuela.

3. While serving in Venezuela, I paid income taxes to the State of Utah and to the federal government on dividends earned from three stock investments.

4. I sincerely believe that performing missionary work – which involves both proselytizing and community service – is one of my most important obligations as member of the LDS Church.

5. I sincerely believe that the Church's scriptures (which include the Holy Bible, Book of Mormon, Doctrine and Covenants, and the Pearl of Great Price) and leaders teach that Jesus Christ calls his servants to minister to their fellow men.

6. I sincerely believe that, as a member of the LDS Church, I have a spiritual obligation to be a good citizen at all times. I also believe that I was still under that obligation while on my mission.

7. When I decided to serve a mission, I met with my bishop, who determined that I was worthy and otherwise eligible to serve a mission. As part of the application process, I completed detailed paperwork informing the Church of my

home address, parents' names, family situation, and ward membership. The bishop then submitted this information to higher church authorities. Eventually, I received a formal call to serve from the President and Prophet of the Church. I consider that all to be analogous to the missionary call that the Apostle Paul received in the New Testament.

8. My call to serve specified both the time period during which I would serve and the geographic area in which I would labor. I believe that both aspects of the call were divinely inspired.

9. While I was on my mission, I stayed in close contact with my family and with my family and with other permanent residents of Utah. All of my personal possessions were stored at my home of residence in Orem, Utah.

10. I returned to Utah immediately at the conclusion of my mission.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 30, 2001.

/s/ Michael Wayne Anderson

MOTION HEARING (EXCERPTS)
MARCH 28, 2001

[*6] JUDGE ANDERSON: It is not enough to satisfy me that you say the principal relief. With respect to the injunctive relief, the only relief that you seek is either, A, the inclusion of LDS missionaries in the census or, B, the elimination of federal employees who were included in the census. That is the only injunctive relief asked for, right?

MR. LEE: That is correct, Your Honor.

JUDGE ANDERSON: Okay. In your reply brief then where you expand that universe to a third one, and you do it several times finally culminating on page 88 of your reply brief saying, look, it can be any group. The Census Bureau can count any similarly situated group and we can't figure out who that might be but they can count anybody. You expand the universe for injunctive relief beyond LDS missionaries, and I trust that we may read your reply brief and all references to [*7] any group other than LDS missionaries as not being included in your injunctive relief request.

MR. LEE: That is correct with regard to the injunctive relief that we have requested in the second amended complaint.

JUDGE ANDERSON: Okay.

MR. LEE: The second amended complaint, however, also seeks a declaration - -

JUDGE ANDERSON: No, I understand that. I'll get to that in a minute. But the only action, other than a declaration the only action that you ask for from this Court deals with including LDS missionaries, period, or excluding the counted

federal employees. I mean, that is the only action other than the declaration that you have asked for?

MR. LEE: That is correct.

* * *

[*8] JUDGE ANDERSON: My third question goes to your equal protection claim. In the complaint among the grievances alleged there is an allegation that the equal protection clause has been violated, the equal protection clause of the Fifth Amendment has been violated.

Than when I look at your briefs in the case I do not see equal protection mentioned in any argument heading. And looking further I look at page 15 of your opening brief where you summarize prior to the beginning of your argument the statutes and the constitutional provisions that you think were violated. On page 15 equal protection is conspicuously omitted from that group. You do mention equal protection in **[*9]** two sentences in four lines in footnote four on page 23 and do not return to it again. In your 88 pages of reply brief it is not mentioned at all. Since you have not developed your argument on equal protection isn't the Court justified in assuming that that argument is out?

MR. LEE: We have raised it rather feebly as Your Honor has pointed out only in a footnote. We certainly don't think that it is one of our stronger claims.

JUDGE ANDERSON: Well, I would go even further than that. I think the Court is entitled when the parties do not develop an argument to the Court and support it with authorities to ignore the argument. I just would like to have a

candid response from you as to whether or not we should try to imagine the argument you would make and then set them up and then try to answer them, or whether we can simply ignore that part of the complaint?

MR. LEE: Candidly, Your Honor, that is perfectly appropriate. We have not developed the argument. We have suggested it only in a couple of sentences. If those sentences are not enough to establish our entitlement to judgment as a matter of law on equal protection, we are not asking the Court to develop the argument for us.

* * *

[*11] JUDGE ANDERSON: Let's just pursue it one step further. You cite one case in footnote four, Nordlinger versus Hahn. That case articulates the standard of review or the test to be a rational basis test. And so if you pursue your equal protection argument I trust that it would be that we would be looking at it from a rational basis standpoint as the test?

MR. LEE: Yes, Your Honor. And I think that goes **[*12]** back to my answer to Judge Benson's question, which is whether there is a rational basis here I think is most properly analyzed under the apportionment clause in the Census Act, which are the provisions directly aimed at the question before the Court today. And it is on that sort of an approach that we decided to relegate our equal protection argument, our rational basis argument to a footnote.

* * *

[*22] JUDGE ANDERSON: As a practical matter, Mr. Lee, and you have gone through and I have 180 pages of hearings in 1999 on the 2000 census, we have the Census 2000 contingency committee represented by democrats abroad and republicans abroad and Americans abroad, businesses with employees abroad, and I might add no one from Utah, nobody from the LDS church, but this thing has been studied and studied and studied. The conclusion was these people you refer to as these, quote, hypothetically similarly situated people are uncountable.

So Congress told the Secretary of Commerce to study it some more and come back this September with a report on any means to count. Now, you tell me if you see it any differently. I mean, you say, well, we don't have the means, but you have studied it and I propose to you that the Census Bureau has amply demonstrated it does not have the means. If so then the only way you can lead us to a decision in this case is to exclude federal employees abroad. That is kind of a speech but it illustrates how I just keep going around and around in my head about what you can practically ask this Court to do that makes any sense at all.

MR. LEE: That may be the only practical remedy, Your Honor.

* * *

[*25] JUDGE ANDERSON: Okay. I just want to interrupt you one more time because I am having a hard time getting comfortable with this proposition in my mind.

The concept of similarly situated persons, as far as you are concerned once you get beyond federal employees and LDS missionaries, is amorphous.

MR. LEE: Correct, in the sense that there is not any data with regard to any other groups before the Court.

JUDGE ANDERSON: And do you acknowledge that it would be virtually impossible within any reasonable time frame to get data sufficiently valid and accurate to advance the goal of equal representation on a similarly situated basis?

MR. LEE: I don't have any reason to disbelieve **[*26]** that proposition.

JUDGE ANDERSON: Okay. And you are not, I take it, asking that we order that the 2000 census be retaken?

MR. LEE: No, Your Honor.

Again, going back to our declarative relief, the declarative relief would be a statement that similarly situated persons ought to be treated similarly. Probably that means excluding isolated segments of the population.

JUDGE ANDERSON: Which would be excluding the federal people abroad, which is in your injunctive relief paragraph - -

MR. LEE: Correct.

JUDGE ANDERSON: - - or including LDS missionaries because they are sufficiently similar.

MR. LEE: Correct.

* * *

[*27] JUDGE ANDERSON: . . . Because as a practical matter nothing can be done to search out, quote, other similarly

situated people with any accuracy. So we are down to the very simple proposition, either include LDS missionaries along with federal employees abroad or exclude federal employees abroad. Isn't that what this case finally comes down to as far as our job as a Court is concerned?

MR. LEE: It may, Your Honor, although I don't think the Court needs to presuppose the question of whether there might be other groups who could come forward very quickly like LDS missionaries who might be included.

JUDGE ANDERSON: Mr. Lee, really, again, in all candor, that is going to be wildly haphazard. The Southern Baptists might come forward, we have the Brunson Affidavit **[*28]** here from North Carolina saying that there are 5,000 some odd Southern Baptist missionaries out there, 5,000 some odd students abroad that they have included or that they could include, and then 4,000 in another year and far higher than Utah. The Red Cross might come forward, maybe not, the Jehovah's Witnesses might come forward, maybe not. For all I know the Rastafarians may come forward. How do we know? There is no conceivable way that we can go beyond this LDS group without getting into just wildly inaccurate supposition.

Isn't that right?

MR. LEE: Well, that may be true. All I am saying is I don't think the Court needs to prescribe an answer to that question to the Census Bureau. An order that simply says treat similarly situated members of the overseas population similarly would take care of the problem, because then if the Bureau is right as I suspect it is and Your Honor says that it is, that you could not conduct this broad enumeration of the total population that the constitution requires, then the result is it is

almost certainly going to be a result of exclusion rather than inclusion.

* * *

[*90] JUDGE ANDERSON: The Wayne Anderson affidavit does not say one word about coercion.

MR. LEE: Correct.

JUDGE ANDERSON: It does not say one word about hurt. Wayne Anderson did not say that when he got his mission call he was put to the Hobson's choice of going home and puzzling over whether he should go on his mission or stay home and be enumerated.

Now, I ask you again, where in this record is there actual evidence of, in fact, coercion or a tendency to coerce on any of these plaintiffs who have standing?

MR. LEE: I don't think there is evidence that any individual plaintiff considered the possibility, that that plaintiff might not be counted in the census, and that in turn if not counted in the census might have his vote diluted. There is similarly no evidence in the record that any plaintiff considered not serving a mission.

No. 01-283

In the Supreme Court of the United States

STATE OF UTAH, ET AL., APPELLANTS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO DISMISS OR AFFIRM

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
EDWIN S. KNEEDLER
Deputy Solicitors General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

In the 2000 census, the Census Bureau included federal employees living outside the United States in the official state-level population totals, but the Bureau determined not to include other United States nationals residing abroad. The questions presented are as follows:

1. Whether the Bureau's decision not to include in the official state-level population figures missionaries of the Church of Jesus Christ of Latter-day Saints residing abroad violated the Census Clause (Article I, Section 2, Clause 3) of the Constitution or the Census Act, 13 U.S.C. 1 *et seq.*

2. Whether the Bureau's decision violated the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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In the Supreme Court of the United States

No. 01-283

STATE OF UTAH, ET AL., APPELLANTS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Commerce and the Director of the Bureau of the Census, respectfully moves that this appeal be dismissed or, alternatively, that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-20a) is reported at 143 F. Supp. 2d 1290.

JURISDICTION

The judgment of the district court was entered on April 18, 2001. The notice of appeal (J.S. App. 21a-22a) was filed on June 15, 2001. The jurisdictional statement was filed on August 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act, 13 U.S.C. 1 *et seq.*, states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine." 13 U.S.C. 141(a). The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. See 13 U.S.C. 2, 21. The "tabulation of total population by States" for the purpose of apportionment of Representatives among the States is to be completed and reported by the Secretary to the President within nine months after the April 1 "census date." 13 U.S.C. 141(b). Within one week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in

each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). "Each State shall be entitled * * * to the number of Representatives shown in the statement" submitted by the President. 2 U.S.C. 2a(b). Within 15 days after receiving that statement, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Ibid.*

3. Among the many issues to be considered in conducting the decennial census is whether, and, if so, how, to allocate United States nationals who are residing outside the United States on the census date to particular States for purposes of the apportionment of Representatives among the States. From 1790 through 1890, the only overseas counts took place in connection with the 1830 and 1840 censuses, which resulted in the publication of separate population counts of "crews of naval vessels at sea." 1 A.R. 202. The naval personnel included in those counts were not allocated to any State and were not included in the population for purposes of apportioning Representatives. *Ibid.*

In 1900, the government conducted a separate enumeration of federal military and civilian personnel and their dependents stationed abroad. 1 A.R. 203. Although persons identified in that count were not allocated to particular States, stateside enumerators were instructed that any federal military or civilian employee stationed abroad who was a member of a family living in the United States "should be enumerated as a member of that family, even though he may be absent on

duty at the time of the enumeration." *Ibid.* That instruction was changed in the 1910 and subsequent censuses, however, when enumerators were specifically told that federal military and civilian personnel stationed abroad should *not* be counted as members of stateside families. See, *e.g.*, *id.* at 218. Although the government conducted counts of overseas military and federal civilian employees in several later censuses, the federal personnel included in those counts were not allocated to particular States for purposes of the apportionment of Representatives among the States until the 1970 census. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 792-793 (1992). In conducting the 1970 census, the Census Bureau also made a concerted effort to count private United States citizens living abroad. The counts of private individuals, however, were not used for purposes of apportionment, see 1 A.R. 29-37, 680-681, 768-769; 2 A.R. 1016-1019, in light of concerns about their accuracy. For example, the Census Bureau estimated that the underenumeration of private United States citizens living in Mexico and Canada probably exceeded 90 percent. See 1 A.R. 39-40, 680; 2 A.R. 1016-1017.

The Census Bureau "did not allocate overseas employees to particular States in the 1980 census." *Franklin*, 505 U.S. at 793. Although the Bureau initially "took the position that overseas federal employees would not be included in the 1990 state enumerations either," several bills were introduced in Congress that would have required the inclusion of overseas military personnel for apportionment purposes. *Ibid.* In July 1989, then-Secretary of Commerce Robert Mosbacher decided to allocate overseas federal military and civilian personnel to their home States for purposes of congressional apportionment. *Ibid.* This Court sustained the

constitutionality of that decision, see *id.* at 803-806, finding that the Secretary's approach was "consonant with, though not dictated by, the text and history of the Constitution," *id.* at 806. The Court further observed that "[t]he Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality." *Ibid.*

Prior to the 2000 census, the Bureau established the Census 2000 Contingency Committee on Americans Abroad and conducted an extensive study of the feasibility of counting private citizens living abroad. See J.S. App. 6a n.1. The Committee's report identified a number of difficult issues bearing on whether and how to count Americans overseas, including: (1) Who should be counted? For example, would the enumeration include only U.S. citizens? Only those citizens who can provide a home of record? Only citizens who intend to return to the United States? How should dual citizens be handled, or non-citizen spouses of Americans? (2) How would home states be determined? (3) How would the Census Bureau verify the citizenship and home state information? (4) How would the Census Bureau treat private American citizens living in a U.S. Commonwealth or Territory? (5) How would the Census Bureau obtain contact information for these individuals and actually contact them? (6) How would the Bureau prevent double counting? (7) How would the Bureau pay for such a costly enterprise? See 1 A.R. 650-652; see also 1 A.R. 768-776; 2 A.R. 1159-1161. The Bureau was also concerned that any such count could expose Census 2000 to legal challenges, because incomplete and inaccurate results could skew the apportionment figures. See 1 A.R. 644-645, 678, 772; 2 A.R. 1038.

> The Committee ultimately concluded that
>
> any attempt to enumerate private U.S. citizens abroad in Census 2000 would be a daunting undertaking for very little return. * * * Previous attempts to take a census of Americans overseas have failed, and it is certain that any such effort in the next census would result in data that would be incomplete and of questionable quality.

1 A.R. 649. Accordingly, the Bureau decided to adopt the same approach for the 2000 census that it had utilized in 1990—namely, counting federal military and civilian personnel stationed abroad and their dependents, but not private individuals residing abroad. See J.S. App. 6a & n.1.

As early as 1996, the Census Bureau informed Congress of its intention to count federal personnel stationed overseas and their dependents, but not other United States nationals residing abroad, in the 2000 census. 1 A.R. 559-566. Congress considered, but ultimately did not enact, a bill that would have required the Bureau to count non-federal employees living overseas. See 2 A.R. 1013-1026 (discussing S. 2260, 105th Cong., 2d Sess. (1998)); see also 2 A.R. 1284-1285 (discussing two proposed concurrent resolutions expressing the "sense of Congress" that "all citizens of the United States residing overseas" should be enumerated in the 2000 census). The Census Bureau recommended against enactment of the proposed legislation, expressing the view that "it is neither feasible nor practical to enumerate and allocate to a respective population of the several States all American citizens living abroad as would be required by S. 2260." 2 A.R. 1013. Several months after the year 2000 census date, the Conference Committee on the appropriations bill for the Census

Bureau for fiscal year 2001 requested that the Secretary of Commerce "submit to the Congress, no later than September 30, 2001, a written report on any methodological, logistical, and other issues associated with the inclusion in future decennial censuses of American citizens and their dependents living abroad, for apportionment, redistricting, and other purposes for which decennial census results are used." H.R. Conf. Rep. No. 1005, 106th Cong., 2d Sess. 256-257 (2000). In response to that request, the Census Bureau recently submitted its report, dated September 27, 2001, to the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the House Committee on Appropriations.

4. On January 10, 2001, appellants—the State of Utah, various state and federal officials from Utah, and four citizens of Utah who were residing abroad as missionaries for the Church of Jesus Christ of Latter-day Saints (LDS) during the 2000 census—commenced this action for declaratory and injunctive relief against the Secretary of Commerce and the Director of the Census Bureau. Appellants alleged that by including federal employees residing abroad in the official state-level population totals while declining to count overseas LDS missionaries, the Secretary and the Director had violated the Census Clause, U.S. Const. Art. I, § 2, Cl. 3; the First Amendment; the Equal Protection Clause of the Fifth Amendment; the Fourteenth Amendment; the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*; the Census Act, 13 U.S.C. 1 *et seq.*; and 2 U.S.C. 2a. See App., *infra*, 2a; J.S. App. 6a-7a. Appellants alleged that the State of Utah would have been apportioned an additional Representative in the House of Representatives if the

Census Bureau had either included LDS missionaries residing abroad, or excluded all federal personnel living outside the United States, in calculating the official state-level population totals. App., *infra*, 11a-12a. Appellants requested an injunction directing the Bureau either (1) to include overseas LDS missionaries in, or (2) to exclude all federal overseas employees from, the official apportionment count. *Id.* at 20a; see J.S. App. 7a. The State of North Carolina and several North Carolina officials intervened as defendants. J.S. App. 3a. Pursuant to 28 U.S.C. 2284(a), the case was referred to a three-judge panel of the United States District Court for the District of Utah. J.S. App. 3a.

5. The district court entered summary judgment in favor of the federal and North Carolina defendants (appellees in this Court). J.S. App. 1a-19a.

a. In considering appellants' claims under RFRA and the Free Exercise Clause, the district court explained that "both causes of action require a demonstration that the Census Bureau's decision as to which groups of overseas Americans to enumerate burdened [appellants'] exercise of religion." J.S. App. 10a. The court accepted appellants' assertion that "missionary work 'is one of the most basic and important obligations of the LDS faith.'" *Ibid.* The court concluded, however, that appellants had "present[ed] nothing more than conclusory and completely speculative allegations that their practice of religion or religious beliefs were burdened in any way by the Census Bureau's decision not to enumerate LDS missionaries who were abroad on Census Day 2000," and on that basis it rejected appellants' RFRA and free exercise claims. *Id.* at 10a-11a.

b. With respect to appellants' claims under the Census Clause and the Census Act, the district court

first considered and rejected appellants' claim that "if federal overseas employees are counted in the apportionment count, LDS missionaries must be as well because they are similarly situated to federal overseas employees." J.S. App. 12a; see *id.* at 12a-14a. The court rejected the contention that "LDS missionaries are similarly situated to overseas federal employees," explaining that "LDS missionaries, a tiny fraction of the entire overseas population of five million or so, are not so similarly situated for several reasons, including the very fact that such missionaries are so disproportionately distributed among the states." *Id.* at 13a n.7. The court noted in that regard that "of all LDS missionaries abroad on April 1, 2000 (24,251), a hugely disproportionate number of them (46%) were abroad from Utah." *Id.* at 12a. The court concluded:

> Given that the goal of apportionment is "to achieve a fair apportionment *for the entire country*," *United States Dep't of Comm. v. Montana*, 503 U.S. 442, 464 * * * (1992) (emphasis added), commanding the enumeration of one group from one state obviously fails to further the constitutional goal of "equal representation." Indeed, inclusion of one such group to the clear advantage of one state would seem to undermine another goal of the Apportionment Clause, which is distributive accuracy.

Id. at 12a-13a.

Because inclusion of LDS missionaries in the apportionment count would "clearly and dramatically distort[] distributive accuracy, to the benefit of one state," J.S. App. 13a n.7, the court anticipated that any order directing such persons to be included would precipitate "constitutional challenges * * * from other groups of Americans abroad for religious or other purposes, in-

cluding students studying abroad, employees of companies with overseas offices, retirees, and numerous other groups who are overseas for charitable, humanitarian, or any number of other reasons," *id.* at 13a.[1] The court found that any judicial directive to include within the state-level population figures all "American citizens temporarily abroad, with ties to a particular state and an apparent intention to return to that state," would be impracticable because it would essentially "require that the decennial census conducted in 2000 be retaken." *Id.* at 13a-14a. The court further explained:

> Were we to adopt plaintiffs' suggestion that the Census Bureau can use the records of private organizations like the LDS Church, we discern additional problems in identifying and applying criteria to evaluate the reliability of such records. Although the LDS Church asserts it keeps meticulous records about its overseas missionaries, in order to discharge its own independent obligation to conduct the census, the Census Bureau would nonetheless have to develop some way of verifying the reliability of the information contained in such records. If we compel the Census Bureau to proceed in that direction, it will encounter multiple problems attempting to verify the records of myriad private organizations, each with different records and record-keeping practices and capabilities, in addition to inconsistencies relating to the willingness of such organizations to identify themselves, cooperate, and

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[1] The court noted that the Director of the Census Bureau had "estimated in 1999 that there were five million" non-federal-employee Americans living overseas, J.S. App. 12a, but that "estimates varied from three million to ten million," *id.* at 12a n.6.

> not mount challenges among themselves, the various states, and the Census Bureau.

Id. at 14a n.8.

The district court concluded that the alternative remedy sought by appellants—exclusion of federal personnel stationed abroad from the 2000 census count—was precluded by this Court's decision in *Franklin*. J.S. App. 15a-19a. While acknowledging that the Court in *Franklin* "was not explicitly presented with another group of Americans abroad claiming to be similarly situated to federal employees and seeking on that basis to be enumerated," the district court observed that this Court "obviously knew that federal employees were not the only group of Americans abroad, and that, by enumerating them, the Census Bureau only enumerated a subset of Americans abroad." *Id.* at 16a. The court also found that "[t]he involuntariness of their overseas posting, at the behest of their government, differentiates most federal employees from most non-federal employees living overseas." *Id.* at 17a. The court noted as well that "[i]nclusion of federal employees [in the census], unlike the inclusion of various other groups of private American citizens abroad, does not invite the kind of manipulation by states or the injection of local or parochial bias which the founders wished to avoid." *Id.* at 18a.

Finally, the district court explained that

> federal employees overseas are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas. It has access to records maintained in the ordinary course of business by the government with respect to

> the government's own employees. As the evidence presented in support of the summary judgment motions indicates, there is simply no other group which can be as readily identified and dependably counted as federal employees overseas.

J.S. App. 18a. The district court concluded that the inclusion of overseas federal employees in the apportionment count was "a rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes." *Id.* at 19a.

c. The district court did not address the claim that appellants initially had asserted under the Equal Protection Clause, explaining that appellants had abandoned that argument. J.S. App. 7a. In addition, based on this Court's decision in *Franklin*, the district court rejected appellants' claim under the APA. *Id.* at 8a. In *Franklin*, the Court held that the report of state-level population figures transmitted by the President to Congress pursuant to 2 U.S.C. 2a(a) is not reviewable "final agency action" within the meaning of the APA "[b]ecause it is the President's personal transmittal of the report to Congress that settles the apportionment," 505 U.S. at 798, 799, and the President is not an "agency" within the meaning of the APA, *id.* at 800-801.[2]

d. Judge Benson joined the opinion of the court with respect to appellants' APA, RFRA, and Free Exercise claims, but concurred only in the result with respect to appellants' claims under Article I, Section 2, Clause 3 and the Census Act. J.S. App. 19a-20a.

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[2] Appellants do not press their Equal Protection Clause and APA claims in this Court.

ARGUMENT

In *Franklin* v. *Massachusetts*, 505 U.S. 788, 806 (1992), this Court sustained the decision of the Secretary of Commerce to include overseas federal military and civilian personnel in the state-level apportionment counts as a judgment "consonant with, though not dictated by, the text and history of the Constitution." Notwithstanding that ruling, appellants contend that federal personnel stationed overseas as of the census date may not lawfully be included in the official population totals unless the Secretary also includes missionaries of the Church of Jesus Christ of Latter-day Saints (LDS) who were living abroad on the census date. Because appellants' claims are insubstantial, the appeal should be dismissed. Cf. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 344 (1999). In the alternative, the judgment of the district court should be summarily affirmed.

I. APPELLANTS ARE NOT ENTITLED TO A JUDICIAL ORDER REQUIRING EITHER THE INCLUSION OF LDS MISSIONARIES, OR THE EXCLUSION OF FEDERAL PERSONNEL STATIONED ABROAD, IN THE CALCULATION OF STATE-LEVEL POPULATION FIGURES

In their second amended complaint, appellants requested that the district court "enter an injunction requiring [the Secretary] to apply the 'usual residence' rule to the temporarily absent LDS missionaries who were undercounted in the 2000 census or, in the alternative, enter an injunction requiring [the Secretary] to remove the other temporarily absent citizens from the apportionment count." App., *infra*, 20a. Appellants alleged that either the inclusion of LDS missionaries in

the state-level figures, or the exclusion of overseas federal personnel from the count, would have caused the State of Utah to receive an additional Representative in the House of Representatives. *Id.* at 11a-12a.

A. The district court held that because appellants' second amended complaint did not seek the inclusion in the apportionment count of any persons other than LDS missionaries, appellants had waived their right to request such broader relief. See J.S. App. 11a n.5. But even if appellants had properly preserved their claim to such a remedy, they would lack standing to seek it. In order to satisfy the requirements of Article III, "it must be 'likely,' as opposed to merely 'speculative,' that [the plaintiff's] injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). In this case, it is entirely speculative whether the inclusion in the official population totals of an as-yet unspecified class of "other identifiable Americans living abroad who have retained similar ties to their home States" (J.S. i) would cause Utah to be apportioned an additional Representative. Cf. *Franklin*, 505 U.S. at 802 (opinion of O'Connor, J.) (plaintiffs lacked standing to challenge the method by which federal personnel stationed overseas were allocated to particular States because they had "neither alleged nor shown * * * that Massachusetts would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data").

Appellants' second amended complaint alleged that the State of Utah would receive an additional Representative if LDS missionaries were included in the state-level population totals or if overseas federal personnel were excluded. See App., *infra*, 11a-12a. The

complaint did not allege, however, that Utah would receive an additional Representative if a broader category of United States nationals temporarily residing abroad were included in the count. Appellants nevertheless contend that they "established through evidence submitted to the district court" that "Utah would have been entitled to a fourth Representative following the 2000 census if the Bureau had * * * conducted an enumeration of all Americans residing temporarily abroad." J.S. 6-7. The declarations that appellants submitted in the district court do not support that claim.

Appellants' declarants stated that Utah would be entitled to an additional Representative "*[i]f* the state-by-state distribution of the estimated 3-7 million Americans living abroad * * * mirrored that of the total resident population." Wolfson II Decl. para. 22 (emphasis added); accord Weber Decl. para. 25. Appellants failed, however, to produce any empirical evidence to support their premise that the population of United States nationals residing abroad is in fact so distributed. The Declaration of Lara J. Wolfson, Ph.D., simply stated: "I know of no reason to believe that the full overseas population is distributed any differently than the domestic population. The full overseas population is most likely distributed differently from the overseas federal employee population, and is distributed more like that of the total resident population." Wolfson II Decl. para. 25. The Declaration of Ronald E. Weber, Ph.D., similarly stated: "I know of no reason why the state-by-state distribution of *all* Americans living temporarily overseas would differ significantly from that of the total resident population." Weber Decl. para. 24. Such conclusory assertions that the State-by-State distribution of United States nationals abroad presumptively mirrors the distribution of the

domestic population—or, more precisely, statements that the declarants "know of no reason" why they do not mirror that distribution—are insufficient to carry appellants' burden of establishing an affirmative likelihood that Utah would receive an additional Representative if non-federal employees were added to the apportionment count.

Furthermore, as the government's declarant explained (and appellants' declarants did not refute), various factors could affect the number of residents of any one State who choose to live abroad, including the employment levels in each State, the availability of jobs both within the State and overseas, whether overseas jobs are offered to residents of a particular State by any company doing business there, and the portion of the State's population that speaks a foreign language. See Waite Decl. para. 56 (describing other reasonable assumptions). For that reason as well, there is no basis for concluding that the distribution among the States of all United States nationals abroad would mirror the distribution of the total domestic population. See Waite Decl. paras. 21, 43, 56, 57.

Finally, even if appellants' claim that a broader class of United States nationals living abroad should now be counted were otherwise judicially cognizable, the Secretary could not feasibly be directed at this late date to identify and attribute to particular States those additional United States nationals who resided abroad on April 1, 2000, and who maintained (as of that date) sufficient ties to this country to warrant inclusion in the count under appellants' current theory. As the district court recognized, a judicial order requiring inclusion of all such persons in the count would effectively "require that the decennial census conducted in 2000 be retaken." J.S. App. 14a. The court correctly held that

such a remedy "is a practical, if not an actual, impossibility." *Ibid.*

B. For the foregoing reasons, appellants are left with the claim that either LDS missionaries—alone among all non-federal employees living abroad on April 1, 2000 — should now be included in the State-by-State census counts, or all federal military and civilian personnel stationed overseas on that date must be excluded. Considerations of fairness and confidence in the integrity and political neutrality of the census weigh heavily against allocating one additional group to the States on a post hoc basis in these circumstances. Cf. *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 465-466 (1992). That is especially true where, as here, that group is precisely tailored to shift one Representative to a particular State and there is no realistic opportunity to determine whether other groups may be similarly situated. Furthermore, substantial questions would be raised under the Establishment Clause if the Secretary were now to allocate to particular States LDS missionaries living abroad, but not missionaries of other faiths, or persons called to non-sectarian charitable or humanitarian work, or other United States nationals living and working abroad. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989) (under the Establishment Clause, "[n]either a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another.") (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947)); *Larson* v. *Valente*, 456 U.S. 228, 244-246 (1982) (disparate treatment of different religious groups subject to the closest scrutiny).

Conversely, the "constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, would be greatly

disserved by the alternative remedy appellants seek—the exclusion of all federal military and civilian personnel included in the count. This Court has already sustained the inclusion of overseas federal personnel and their dependents, who totaled 576,367 in the 2000 census. See App., *infra*, 10a. Those personnel vastly outnumbered the 24,251 LDS missionaries who appellants assert were residing abroad on April 1, 2000. See J.S. App. 12a. To exclude the former as a "remedy" for the exclusion of the latter would be wholly disproportionate.

In sum, neither the Census Clause, the Census Act, nor principles governing the award of equitable relief support appellants' request for judicial intervention at this late date.

II. THE SECRETARY'S DECISION TO INCLUDE IN THE APPORTIONMENT COUNT FEDERAL PERSONNEL STATIONED OVERSEAS, BUT NOT OTHER UNITED STATES NATIONALS LIVING ABROAD, DOES NOT VIOLATE THE CENSUS CLAUSE OR THE CENSUS ACT

The Census Clause vests Congress with broad discretion to conduct "[t]he actual Enumeration * * * in such Manner as they shall by Law direct." Article I, Section 2, Clause 3; see *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996) ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' and * * * there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.") (citation omitted). Congress has in turn conferred upon the Secretary of Commerce the authority to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a); see

City of New York, 517 U.S. at 19 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary."). Although the courts may review the Secretary's decisions regarding census methodology "to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, substantial judicial deference is appropriate in light of "the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," *City of New York*, 517 U.S. at 23. "In light of the Constitution's broad grant of authority to Congress, the Secretary's decision[s] [regarding the conduct of the census] need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20.

Appellants do not contend that either the Constitution or the Census Act compelled the Secretary to include LDS missionaries in the apportionment count. Indeed, their complaint appears to assume (correctly) that the Secretary might legitimately have chosen to exclude from the state-level totals *all* United States nationals who resided abroad on the census date, as had been done in all censuses (with one limited exception in 1900, see *Franklin*, 505 U.S. at 792-793; pp. 3-4, *supra*) prior to 1970. See 505 U.S. at 806 (Secretary's decision to include federal personnel stationed overseas was "a judgment, consonant with, *though not dictated by*, the text and history of the Constitution") (emphasis added). Rather, the gravamen of their suit is that the Secretary could not lawfully differentiate in this context between federal personnel and other United States nationals who were temporarily resident abroad as of that date.

See, *e.g.*, J.S. 20 (asserting that "overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population"). That claim lacks merit.

A. An individual's status as a member of the Armed Forces or federal civilian employee creates distinct connections to the United States, and to the individual's prior State of residence, that United States nationals living abroad for other reasons do not necessarily share. Overseas federal military and civilian personnel are by definition residing abroad in service of their country. An individual whose physical absence from the United States is the consequence of federal service may more readily be assumed to retain the "element of allegiance or enduring tie to" this country that has historically underlain the concept of "usual residence." See *Franklin*, 505 U.S. at 804. Because they are in the service of the United States, moreover, such persons may be subject to various federal statutory and regulatory requirements that are inapplicable to private citizens abroad. Those individuals also often live or work in areas—such as military bases and embassies—over which the United States government exercises plenary control. Neither the text nor the history of the pertinent constitutional and statutory provisions suggests that the Secretary is precluded from taking those differences into account in determining whether particular United States nationals temporarily resident abroad retain sufficient "ties to the States," *id.* at 806, to justify their inclusion in the apportionment count.

B. Not only does the Census Bureau have unique reasons to include federal military and civilian personnel stationed overseas in the apportionment count, it also has particularly accurate data regarding that category of United States nationals living abroad. The

Census Bureau "has access to data about [overseas federal military and civilian personnel] which is different both in quality and quantity from the data available about other Americans overseas." J.S. App. 18a. The Bureau "has access to records maintained in the ordinary course of business by the government with respect to the government's own employees." *Ibid.*

Even if there are other categories of United States nationals abroad who might reasonably be expected to retain ties to this country that are comparable in some measure to those of federal employees, the information necessary to identify such persons and allocate them to particular States will not typically be in the possession of the federal government. And the Bureau is likely to "encounter multiple problems attempting to verify the records of myriad private organizations, each with different records and record-keeping practices and capabilities, in addition to inconsistencies relating to the willingness of such organizations to identify themselves, cooperate, and not mount challenges among themselves, the various states, and the Census Bureau." J.S. App. 14a n.8. Reliance on private records would also require the Bureau to devise procedures to ensure that persons identified in such records had not previously been counted (*e.g.*, through inclusion on a census form submitted by a relative who resided in the United States on the census date). Cf. Waite Decl. para. 52. The district court therefore correctly concluded that "there is simply no other group which can be as readily identified and dependably counted as federal employees overseas." J.S. App. 18a.

Appellants contend (J.S. 19-20) that LDS missionaries are in this respect similarly situated to federal employees abroad because LDS missionaries can likewise be reliably identified and allocated to particular

States through the use of pre-existing records maintained by the Church itself. The Secretary could properly conclude, however, that the integrity of the census would be compromised if the task of enumerating subsets of the population were effectively delegated to private organizations.[3] The reasonableness of that determination does not depend on courtroom proof that a particular organization's records are in fact unreliable. Thus, "[a]lthough the LDS Church asserts it keeps meticulous records about its overseas missionaries, in order to discharge its own independent obligation to conduct the census, the Census Bureau would nonetheless have to develop some way of verifying the reliability of the information contained in such records." J.S. App. 14a n.8.

The Secretary could also reasonably determine that any such standards for utilizing private records of the sort on which appellants rely should be developed in advance of the census and be stated in terms that apply to the records of private organizations more generally. No comparable difficulties attend the inclusion in the apportionment count of United States government

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[3] The Constitution's express decision to entrust the "actual Enumeration" to Congress reflects the Framers' awareness that only the national government could dispassionately perform a function integral to the apportionment of Representatives among the States. As Edmund Randolph explained at the Constitutional Convention, "[t]he census must be taken under the direction of the General Legislature. The States will be too much interested to take an impartial one for themselves." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 580 (1966 ed.). Delegation of the federal government's census-taking responsibilities to a private organization would raise similar concerns. That is particularly so with respect to an entity, like the LDS Church, whose organizational structure and membership are disproportionately concentrated in a single State.

employees temporarily resident abroad on the census date, whose identities and prior States of residence can be easily ascertained through pre-existing *federal* records. See *id.* at 18a (noting that "[i]nclusion of federal employees, unlike the inclusion of various other groups of private American citizens abroad, does not invite the kind of manipulation by states or the injection of local or parochial bias which the founders wished to avoid").

C. Appellants also suggest (J.S. 17) that the Secretary's decision to include federal military and civilian personnel stationed overseas (but not LDS missionaries) in the apportionment count constituted a form of "sampling" prohibited by 13 U.S.C. 195. That claim is wholly without merit. The government did state in the district court that federal employees abroad, unlike LDS missionaries, are distributed among the States in proportions roughly comparable to the distribution of the domestic population. See J.S. 10 n.5, 16 n.8; see also J.S. App. 17a. The government did not and does not seek, however, to defend the inclusion of overseas federal employees in the apportionment count as a means of estimating the total population of United States nationals abroad. The Census Bureau's reasons for including those employees in the state-level population totals were presented to this Court in *Franklin*, and this Court sustained the Secretary's decision. The fact that federal personnel stationed overseas are in some sense representative of the total United States population is not by itself a sufficient ground for including them in the count, but neither is it a basis for excluding them.

D. Because the Court in *Franklin* "was not explicitly presented with another group of Americans abroad claiming to be similarly situated to federal employees and seeking on that basis to be enumerated," J.S. App.

16a, its decision does not squarely control the instant case. As the district court observed, however, this Court "obviously knew that federal employees were not the only group of Americans abroad, and that, by enumerating them, the Census Bureau only enumerated a subset of Americans abroad." *Ibid.* The *Franklin* Court's facially unqualified approval of the approach taken by the Bureau in the 1990 census surely suggests that the Court perceived no infirmity in the Bureau's decision to differentiate between federal employees and other United States nationals residing abroad.

III. THE CENSUS BUREAU'S DECISION NOT TO INCLUDE NON-FEDERAL EMPLOYEES RESIDING ABROAD IN THE APPORTIONMENT COUNT DOES NOT VIOLATE ANY APPELLANT'S RIGHTS UNDER THE FREE EXERCISE CLAUSE OR THE RFRA

The four appellants who were LDS missionaries living abroad on the census date also assert claims under the Free Exercise Clause and the RFRA. See J.S. App. 9a n.3 (noting appellants' concession that only the four missionary appellants have standing to bring free exercise and RFRA claims). Those appellants contend that the Census Bureau has imposed a substantial burden on their religious exercise, because as a consequence of their missionary service the State of Utah has been apportioned three rather than four Representatives. See J.S. 25. Those claims lack merit. Appellants' free exercise claim fails at the outset because the government policy that they challenge does not target religious practice or belief, but is instead a neutral rule applicable to *all* non-federal employees who resided abroad on the 2000 census date. In any

event, that policy imposes no substantial burden on any appellant's exercise of religion, since the effect of a missionary's decision to reside abroad is simply that his prior State of residence is credited with one fewer inhabitant.

A. Appellants contend that the challenged Census Bureau policy has the practical effect of discouraging missionary service because "the Bureau's discriminatory policy clearly denies a benefit (an additional congressional seat) because of conduct mandated by religious belief (missionary service)." J.S. 25 (internal quotation marks omitted). This Court's precedents make clear, however, that a neutral law of general applicability does not violate the Free Exercise Clause even if its practical effect is to disadvantage persons who have engaged (or who would otherwise wish to engage) in religiously motivated conduct. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), for example, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted); see *id.* at 886 n.3 ("religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"). Subsequent decisions of this Court have reaffirmed that neutral laws do not violate the Free Exercise Clause because of their impact on religious practices. See *City of Boerne* v. *Flores*, 521 U.S. 507, 514 (1997) ("*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S.

520, 531 (1993) ("a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"); J.S. App. 9a.

Appellants do not contend that the Census Bureau has excluded LDS missionaries from the apportionment count *because* their absence from this country on the census date was religiously motivated. Cf. *Church of the Lukumi*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest") (citation omitted). Rather, exclusion of the LDS missionaries was simply one aspect of a neutral, generally applicable policy covering all non-federal employees residing abroad as of the census date. Indeed, far from complaining that the government has singled them out for disfavored treatment because of their religion, appellants effectively seek favorable treatment because their absence from the country was religiously motivated. Appellants therefore could not prevail on their free exercise claim even if they could establish that their exclusion from the apportionment count substantially burdened their exercise of religion.

B. 1. The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. 2000bb-1(a), unless the challenged government practice is the least restrictive means of furthering a compelling government interest, 42 U.S.C.

2000bb-1(b).[4] Contrary to appellants' contention (J.S. 24-28), however, the exclusion of LDS missionaries from the apportionment count does not "substantially burden" their exercise of religion. An individual derives no concrete benefit from inclusion in the census, and he suffers no concrete injury from being left uncounted. Indeed, the Census Clause and the Census Act do not appear to confer any legally cognizable personal rights at all on individual members of the population to be included in the census count. Rather, the interests protected by the Census Clause and the Census Act are those of the States and the general populations of the respective States.

Accordingly, insofar as the challenged Census Bureau policy is concerned, the only disadvantage that an LDS missionary suffers as a result of his decision to reside abroad on the census date is that the President credits his State with one fewer inhabitant. That governmental action in arriving at a State's total population has at most a *de minimis* effect on a particular missionary's religious exercise; it surely does not impose a "substantial[] burden" of the sort to which RFRA is directed. Compare *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Indeed, the burden appellants claim—the loss of "an additional congressional seat"—is visited upon the State, not appellants. Any disadvantage that a missionary suffers as a result of the reduction in the number of inhabitants attributed to his prior State of residence is not imposed

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[4] Although this Court has held the RFRA to be unconstitutional as applied to the States, see *City of Boerne*, *supra*, the statute may validly be applied to the activities of the federal government. See J.S. App. 9a n.4.

on the missionary alone, but is shared equally by all other persons within the relevant State.[5]

Thus, despite appellants' concession (see J.S. App. 9a n.3) that only the four LDS missionary plaintiffs (rather than the State of Utah and/or its officials) have standing to pursue a RFRA claim, appellants have failed to show that any individual missionary would suffer a meaningful disadvantage as a result of *his own* religious exercise. Rather, the thrust of appellants' claim is that the challenged Census Bureau policy has a disparate impact on the State of Utah, and on its inhabitants generally, because Utah has a larger-than-average number of residents whose religious convictions led them to reside abroad on the census date. Appellants identify no precedent suggesting that any such disparate impact on a larger group, of which LDS missionaries comprise only a small subset (see note 5, *supra*), can form the basis of a valid RFRA claim.

Finally, any burden on religious exercise that may be imposed by the Census Bureau's decision not to include LDS missionaries abroad within the apportionment count is independent of the Bureau's decision that overseas federal military and civilian personnel stationed abroad *should* be counted. If the Bureau had adopted a categorical rule that no United States nationals residing abroad on the census date would be included in

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[5] Appellants' second amended complaint alleged that "[a]ccording to the census, the total resident population of Utah in 2000 was 2,236,714." App., *infra*, 10a. The complaint further alleged that "eleven thousand one hundred and seventy-six of the LDS missionaries stationed outside of the United States were from Utah." *Id.* at 11a. Thus, on appellants' own theory, fewer than one half of one percent of the persons who are disadvantaged by the allocation to Utah of three rather than four Representatives were LDS missionaries residing abroad on the census date.

the state-level population totals, an individual's decision to serve as an LDS missionary would have the same consequence that it has under the Bureau's actual policy: namely, that the individual's State would be credited with one fewer inhabitant than would otherwise be the case. Appellants do not contend, however, that such a policy would violate any missionary's rights under the RFRA.

2. Contrary to appellants' suggestion (J.S. 24-25, 27-28), the district court did not suggest that a plaintiff must actually forgo religious exercise in order to assert a valid RFRA claim. Rather, the court relied (see J.S. App. 10a) on appellants' complete failure to present evidence that the challenged Bureau policy "in any way burdened, or even tended to burden or coerce, [any appellant's] free exercise of his religious belief in the performance of missionary work."

As the district court observed, "[o]nly one of the four LDS missionary plaintiffs has filed an affidavit in support of [appellants'] motion for summary judgment." J.S. App. 10a. The Declaration of Michael Wayne Anderson stated: "I sincerely believe that performing missionary work—which involves both proselytizing and community service—is one of my most important obligations as a member of the LDS Church." Anderson Decl. para. 4. Mr. Anderson also declared: "My call to serve specified both the time period during which I would serve and the geographic area in which I would labor. I believe that both aspects of the call were divinely inspired." *Id.* at para. 8.

That declaration established that Mr. Anderson's absence from this country was motivated by his religious convictions. The declaration contained no reference to the 2000 census, however, let alone any explanation of how Mr. Anderson's religious exercise

was burdened by the Census Bureau's decision not to include non-federal employees residing abroad in the apportionment count. In light of appellants' complete failure to produce evidence of a substantial burden on religious exercise—as well as the fact that the failure to include any one individual in the census count of a State affects all inhabitants of the State equally and does not distinctly injure the individual concerned (see pp. 26-28, *supra*)—the district court correctly found that appellants had "present[ed] nothing more than conclusory and completely speculative allegations that their practice of religion or religious beliefs were burdened in any way by the Census Bureau's decision not to enumerate LDS missionaries who were abroad on Census Day 2000." J.S. App. 10a-11a.

CONCLUSION

The appeal should be dismissed. In the alternative, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

PAUL D. CLEMENT
EDWIN S. KNEEDLER
Deputy Solicitors General

MALCOLM L. STEWART
Assistant to the Solicitor General

MARK B. STERN
MICHAEL S. RAAB
JONATHAN H. LEVY
Attorneys

OCTOBER 2001

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. F-2-01-CV-23:B

STATE OF UTAH, MICHAEL O. LEAVITT, GOVERNOR, OLENE S. WALKER, LIEUTENANT GOVERNOR, MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL, L. ALMA MANSELL,PRESIDENT OF THE UTAH SENATE, MARTIN R. STEPHENS, SPEAKER OF THE UTAH HOUSE, MIKE DMITRICH, UTAH SENATE MINORITY LEADER, RALPH BECKER, UTAH HOUSE MINORITY LEADER, ORRIN G. HATCH, UNITED STATES SENATOR, ROBERT F. BENNETT, UNITED STATES SENATOR, JAMES V. HANSEN, MEMBER OF CONGRESS, CHRISTOPHER B. CANNON, MEMBER OF CONGRESS, JAMES MATHESON, MEMBER OF CONGRESS, BLAKE J. RUSSON, MICHAEL WAYNE ANDERSEN, BRENT & JEAN MCGHIE, PLAINTIFFS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE; WILLIAM G. BARRON, ACTING DIRECTOR, UNITED STATES CENSUS BUREAU, DEFENDANTS

Filed: January 30, 2001

PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

THREE-JUDGE PANEL REQUESTED PURSUANT TO 28 U.S.C. § 2284

Plaintiffs, the State of Utah ("Utah" or the "State"), and various citizens and representatives of Utah, hereby submit this Complaint and allege as follows in support of their claims for relief:

NATURE OF THE CASE

This is an action for declaratory and injunctive relief arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the All Writs Act, 28 U.S.C. § 1651; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("the APA"); the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*; Section 2a of Title 2; the Census Act, 13 U.S.C. § 1 *et seq*; Section 2, Clause 3 of the United States Constitution; the First Amendment; Section 2 of the Fourteenth Amendment; and the Equal Protection Clause of the Fifth Amendment, against Donald L. Evans,[1] in his official capacity as the Secretary of Commerce and William G. Barron, in his official capacity as the Acting Director of the United States Census Bureau (collectively, "Defendants"). The present action challenges the Defendants' failure, in the most recent census, to count missionaries of the Church of Jesus Christ of Latter-day Saints ("the LDS Church") who are temporarily serving abroad on the same terms as federal employees temporarily serving abroad. The Defendants' failure to treat these two groups of American citizens equally has thus far

[1] The Senate approved the nomination of Donald L. Evans to be Secretary of the Department of Commerce on January 20, 2001. With the ongoing change of the federal administration, William G. Barron has assumed the post of Acting Director of the Census Bureau. Pursuant to Fed. R. Civ. P. 25(d), Secretary Evans and Mr. Barron have been automatically substituted for the predecessors in their respective offices.

resulted in Utah's being deprived of an additional member of Congress to which the State is entitled.

1. This Complaint stems from the actions of the Defendants, who are the executive and legislative officers charged with conducting the 2000 census. As such, the Defendants are constitutionally charged with performing an "actual Enumeration" of the people of the United States every ten years. *See* U.S. Const. Art. 1, § 2, cl. 3.

2. As census officials, one of the most important functions that the Defendants perform is to determine the current "apportionment population." The apportionment population is the "total resident population (citizens and non-citizens) of the 50 states." *See* U.S. Census Bureau, *http://www.census.gov/population/www/censusdata/apportionment/faq.html.* It is on the basis of this count that seats in the United States House of Representatives are reapportioned among the fifty states.

3. This Complaint seeks an order directing the Defendants to apply a uniform and consistent standard in counting certain citizens who were temporarily absent from their usual residence during the tabulation of the apportionment population. Specifically, this Complaint seeks an order directing the Defendants to include within the final apportionment calculation those missionaries of the LDS Church who, like other Utahns and Americans serving abroad in the military or other federal service, were temporarily absent from their usual residence at the time of the census. Alternatively, the Complaint seeks an injunction requiring Defendants to remove the other temporarily abroad citizens from the apportionment count.

4. The Defendants' failure to include the temporarily abroad LDS missionaries in the 2000 apportionment calculation was a result of the Census Bureau's application of different standards to similarly situated individuals. As a first step in determining the apportionment population, the Census Bureau divided the total national population into two groups. The composition of the first and larger of these apportionment groups was determined by application of a uniform standard: the group consisted of all persons who were residing in the United States at the time of the census. *See* U.S. Census Bureau, *http://www.census.gov/ population/ www/censusdata/apportionment/ faq.html.*

5. The Census Bureau also used a uniform standard in allocating the members of the first apportionment group among the several states. Each resident was allocated according to his or her "usual residence," which the Census Bureau defined as "the place where [a person] live[s] and sleep[s] most of the time (most of the week, month, or year)." U.S. Census Bureau, *http://www.census.gov/population/www/censusdata/apportionment/faq.html.*

6. The Census Bureau's second apportionment group consisted of United States citizens who were living outside of the United States and thus were temporarily absent from their usual place of residence. Not all of the overseas United States citizens who were temporarily absent from their usual place of residence were included within the group, however. The Census Bureau excluded any United States citizen temporarily living abroad unless the person was a federal employee or a dependent of a federal employee living abroad.

7. Under the Census Bureau's disparate system for counting citizens temporarily living overseas, the select few United States citizens temporarily living abroad who were *also* federal employees or dependents were allocated back to their home state for purposes of the apportionment population. However, similarly situated LDS missionaries, who were also temporarily living abroad for predetermined period but who were not federal employees or dependents, were excluded for purposes of any apportionment population. In this respect, the Census Bureau discriminated against LDS missionaries temporarily living abroad based on the identity of the entity that sent them abroad (and therefore based on the secular or religious reason that they went abroad)—thereby depriving many temporarily absent citizens and their home states of the benefit of their presence in the apportionment count.

8. Plaintiffs therefore respectfully seek a declaration from this Court that the Census Bureau's disparate treatment of similarly-situated citizens is unconstitutional under the Apportionment Clause, the Fourteenth Amendment, the First Amendment and the Equal Protection Clause of the Fifth Amendment, is arbitrary and capricious under the APA, and violates the provisions of 2 U.S.C. § 2a, RFRA, and the Census Act.

THE PARTIES

9. The State of Utah ("Utah") entered the Union on January 4, 1896 as the 45th state.

10. Michael O. Leavitt is the Governor of Utah.

11. Olene S. Walker is the Lieutenant Governor of Utah.

12. Mark L. Shurtleff is the Attorney General of Utah.

13. L. Alma Mansell is the President of the Utah State Senate.

14. Martin R. Stephens is the Speaker of the Utah State House of Representative.

15. Mike Dmitrich is the Utah State Senate Minority Leader.

16. Ralph Becker is the Utah State House Minority Leader.

17. Orrin G. Hatch is the senior United States Senator from the State of Utah.

18. Robert F. Bennett is the junior United States Senator from the State of Utah.

19. James V. Hansen, is a Representative from the First Congressional District of Utah.

20. James Matheson is a Representative from the Second Congressional District of Utah.

21. Christopher B. Cannon is a Representative from the Third Congressional District of Utah.

22. Blake J. Russon is a citizen of the State of Utah, who at the time of the 2000 census was serving as an LDS missionary outside of the United States, and due to the disparate treatment alleged in this lawsuit was not counted in the census. He has recently resumed his residence in the State of Utah.

23. Michael Wayne Anderson is a citizen of the State of Utah, who at the time of the 2000 census was serving as an LDS missionary outside of the United States, and due to the disparate treatment alleged in this lawsuit was not counted in the census. He has recently resumed his residence in the State of Utah.

24. Brent & Jean McGhie are citizens of the State of Utah who are currently serving as LDS missionaries in the Republic of Georgia and who were outside of the United States at the time of the 2000 census. Due to the disparate treatment alleged in this lawsuit the McGhies were not counted in the census. They intend to resume their residence in the State of Utah at the end of their mission to Georgia.

25. Donald L. Evans is the Secretary of the United States Department of Commerce.

26. William G. Barron is the Acting Director of the United States Census Bureau.

JURISDICTION AND VENUE

27. Jurisdiction in this Court is proper under 28 U.S.C. § 2284. Pursuant to that section, Plaintiffs request that a three-judge district court be convened.

28. Venue is proper in this Court under 28 U.S.C. § 1391(e)(2) & (3).

GENERAL ALLEGATIONS

29. Both Article I, Section 2, Clause 3 of the United States Constitution and the Fourteenth Amendment to that document direct that every ten years the Executive Branch must count the number of persons in each

State, "in such manner as [Congress] shall by law direct." On the basis of the census, each state is allotted a number of Representatives in Congress proportional to its population.

30. Pursuant to its constitutional authority to determine how the "actual Enumeration" of the population should be conducted, Congress enacted the Census Act, 13 U.S.C. § 1 *et seq.* (the "Act"). The Act provides that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. § 141(a). Furthermore, "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). The President must then "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Within 15 days, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which each State is entitled." *Id.* § 2a(b).

31. Since the first census in 1790, the U.S. Census Bureau, pursuant to authority delegated to it by the Secretary of Commerce, 13 U.S.C. §§ 2, 4, has allocated persons to their home states according to their "usual residence." The first enumeration Act interpreted "usual residence" broadly, such that "every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he

usually resides in the United States." Act of Mar. 1, 1790, § 5, 1 Stat. 103. The concept took on broad meaning in the related context of congressional residence qualifications, U.S. Const. Art. I, § 2, as the Framers interpreted "inhabitants" to include "persons absent occasionally for a considerable time on public or private business." 2 Farrand, Records of the Federal Convention of 1787, at 217 (Madison).

32. Despite the Framers' broad interpretation of "usual residence," the Census Bureau has utilized a varying and occasionally narrow approach in allocating Americans temporarily living abroad to their home states. For example, the Bureau's apportionment figures included LDS missionaries serving in foreign countries in the 1910, 1920, 1930 and 1940 census, but have excluded them thereafter. *See* Karen M. Mills, *Americans Overseas in U.S. Census*, at 1, Bureau of Census, U.S. Dep't of Commerce, Technical Paper 62 (1993). With the exception of the 1900 census, the Bureau only began to count overseas military personnel in 1970, allocating them to their "home of record," namely the state to which they declared they would return at the end of their service. In 1980, finding that some overseas personnel were choosing their "home of record" on the basis of tax considerations, the Bureau ceased allocating overseas federal employees to particular states. However, the federal employees still considered themselves to be "usual residents" of the United States, and for that reason, among others, the Bureau again reversed its policy in 1990 and allocated federal employees living overseas according to their "home of record."

33. On April 1, 2000, the Census Bureau conducted the 2000 census. In its count of Americans living overseas, the Census Bureau once again included, with modest exception, U.S. military and federal civilian employees (and their dependents), allocating them to their home states based on data provided by the federal agencies that employed them, where available. Beyond federal employees (and their dependents), the Bureau did not include any Americans temporarily working, studying or living overseas.

34. On December 28, 2000, the Census Bureau released the first results of the Census, according to which the resident population was 281,421,906, a 13.2% increase from the 1990 census. 576,367 temporarily absent federal employees were also enumerated and allocated among the states.

35. According to the census, the total resident population of Utah in 2000 was 2,236,714. On this basis, Utah was apportioned three congressional seats.

36. Not included within the Utah, or the total national, population were those Americans temporarily living abroad, but who were not federal employees or dependents, such as the thousands of Utah citizens who were serving abroad as LDS missionaries at the time of the census.

37. Members of the LDS Church traditionally serve as missionaries for a discrete period of time—young men usually for 2 years, young women for 18 months, and older couples for one to three years. Their stations outside of the United States are temporary: the missionaries do not live more than four to six months in

any one location, and virtually all return home at the end of their service.

38. Many members of the LDS Church, and a correspondingly large proportion of LDS missionaries who serve outside of the Untied States, reside in Utah and return there after completing their service. While temporarily absent from Utah these missionaries continue to regard Utah as their home of residence. In fact, many of these missionaries continue to vote in the state by absentee ballot.

39. The LDS Church maintains records of the identity, temporary location and usual residence of these missionaries, similar to the data federal agencies provide the Census Bureau regarding their employees outside the United States. In 2000, eleven thousand one hundred and seventy-six of the LDS missionaries stationed outside of the United States were from Utah.

40. Had the Census Bureau properly enumerated these 11,176 Utah citizens, Utah would have been apportioned one additional seat in the House of Representatives as a result of the 2000 census. In fact, Utah would have received one additional Representative if the census had counted even 900 of the 11,176 Utah citizens that were excluded. Under the current, incomplete census 2000 count, that additional seat is slated to go to North Carolina, which was awarded 13 congressional seats on the basis of its population of 8,067,673.

41. Alternatively, Utah would also have been apportioned one additional seat in the House of Representatives if the Census Bureau had uniformly excluded all temporarily absent, overseas citizens from

its apportionment count. Based on the Bureau's count of all persons residing in the United States, Utah was slated to receive an additional Representative. Only when the Bureau added temporarily overseas federal employees to the census, while excluding similarly situated LDS missionaries, did the additional House seat transfer from Utah to North Carolina.

42. This loss of equal congressional representation is not the only injury traceable to Defendants' actions. Defendants' unequal treatment of temporarily overseas U.S. citizens will also deprive Utah of a full voice in at least two presidential elections. "The number of electoral votes allotted to each State corresponds to the number of Representatives and Senators that each States sends to Congress." National Archives and Records Administration, htt://www.nara.gov/fedreg/elctcoll/faq.html#number. Accordingly, by excluding from the census LDS missionaries who were temporarily living abroad while including federal employees and dependents in the same situation, Defendants have deprived Utah of a member of the Electoral College and thereby undermined the state's equal representation in the selection of our presidents.

43. Unless reversed, Defendants' discriminatory undercount of Utah's citizens will also deprive Utah and its citizens of their fair and intended share of federal funding and will skew the allocation of revenues within the state. A number of federal programs allocate the nation's resources to the several states and their citizens according to population. Relying on the accuracy and completeness of the census, the federal government looks to the census to determine the states' respective populations. Accordingly, by excluding more

than eleven thousand temporarily absent Utahns from the census, Defendants have deprived Utah and its citizens of the resources they are intended and entitled to receive.

CLAIMS FOR RELIEF

Count I
(U.S. Constitution Article I, Section 2, Clause 3, U.S. Constitution, Amend. XIV, Sec. 2)

44. Plaintiffs reallege paragraphs 1-43 as if set forth fully herein.

45. The Constitution requires that Defendants conduct an "actual Enumeration" of the "whole number of persons in each State." U.S. Const. Art. I, Sec. 2, Cl. 3; U.S. Const. Amend. XIV, § 2. This procedure is necessary so that Members of the U.S. House of Representatives may be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3; *see also* U.S. Const. Amend. XIV, § 2.

46. Defendants' refusal to include within the decennial census numerous Utah citizens who were temporarily absent from their ususal place of residence (while counting other temporarily absent residents) violates these constitutional mandates.

Count II
(The First Amendment)

47. Plaintiffs reallege paragraphs 1-46 as if set forth fully herein.

48. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. Amend. I.

49. Defendants' actions violate the Free Exercise Clause because they burden a hybrid of the free exercise due process, equal protection, and apportionment rights of temporarily absent Utah citizens.

50. Alternatively, Defendants' actions violate the Free Exercise Clause because they provide secular but not religious exceptions from the rule that temporarily absent American citizens will not be enumerated and allocated in the census. Because of this discriminatory system of categorical exceptions, Defendants' conduct is not neutral and generally applicable.

51. Even if Defendants' discriminatory system of categorical exceptions is viewed as being neutral and generally applicable, it violates the First Amendment because it makes a value judgment that certain secular reasons for temporarily living abroad are more important than certain religious reasons for temporarily living abroad.

52. Because Defendants' conduct burdens a hybrid of constitutional rights, is not neutral and generally applicable, and categorically grants secular but not religious exceptions, it may be sustained only on a showing that the denial of a religious exception for temporarily absent LDS missionaries serves a compelling governmental interest and is the least restrictive means of furthering that interest. Defendants' conduct cannot be justified under that standard.

Count III
(Equal Protection—Disparate Treatment of Similarly Situated Voters and Citizens)

53. Plaintiffs reallege paragraphs 1-52 as if set forth fully herein.

54. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is a fundamental constitutional guarantee essential to the success of our democratic from of government.

55. The Equal Protection Clause protects the exercise of this fundamental right. In particular, the principle of equal protection prohibits the government from "discriminat[ing] between categories of qualified voters in a way that . . . is wholly arbitrary." *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

56. The Equal Protection Clause also requires that government treat similarly situated citizens similarly outside of the voting context unless the government can show a rational reason for discriminating against a particular group.

57. Defendants' decision to exclude from the decennial census thousands of Utah citizens who, at the time of the 2000 census, were stationed abroad as missionaries while at the same time including in its count Americans who were working abroad for U.S. government arbitrarily discriminates among similarly-situated classes of citizens and voters and thereby violates the constitutional guarantee of equal protection.

Count IV
(The Administrative Procedure Act)

58. Plaintiffs reallege paragraphs 1-57 as if set forth fully herein.

59. The right to be free from arbitrary and capricious government action is protected not only by the Constitution, but also by the Administrative Procedure Act. *See* 5 U.S.C. §§ 701-706. Likewise, the APA protects against final agency actions which infringe on the constitutional rights of equal protection and equal representation. *See* 5 U.S.C. § 706.

60. Defendants' actions in including temporarily absent overseas federal workers in the decennial census while excluding temporarily absent overseas LDS missionaries are arbitrary and capricious and infringe on the rights of equal protection and equal representation.

61. Defendants' repeated change in policy regarding the counting of U.S. citizens temporarily living abroad at the time of a census also violates the APA because Defendants have failed to provide a rational explanation or basis for their frequent and contradictory policy shifts.

62. These actions deprive Utah of political representation and federal funding to which the state and its citizens are entitled. Defendants actions' must therefore be reversed under 5 U.S.C. §§ 701-706.

Count V
(2 U.S.C. § 2a)

63. Plaintiffs reallege paragraphs 1-62 as if set forth fully herein.

64. In implementing the Constitution's command for an actual enumeration of each state's population, 2 U.S.C. § 2a(a) requires the President to "transmit to the Congress a statement showing the *whole number* of persons in each State, . . . as ascertained under the . . . decennial census *of the population*, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a) (emphasis added).

65. Defendants' exclusion of temporarily absent LDS missionaries from the census contravenes Congress' plainly expressed intent that the census should include, as far as practicable, a complete accounting of the population and a resulting equal apportionment of Representatives.

Count VI
(The Census Act)

66. Plaintiffs reallege paragraphs 1-65 as if set forth fully herein.

67. The Census Act, as amended, requires Defendants to create a "tabulation of *total population* by States." 13 U.S.C. § 141 (emphasis added). In this and other expressions, the Census Act makes clear that Defendants are required to conduct an actual count of the total population of the United States. *See e.g.*, Pub. L. 105-119, Title II, §§ 209, 210(a)- (j), 111 Stat. 2480.

68. Properly interpreted, the Census Act requires Defendants to enumerate and allocate the readily identifiable LDS missionaries who are temporarily absent from their usual residences. Defendants' failure to do so violates Congress' intent, as expressed in the Census Act.

69. Alternatively, if the Census Act can be interpreted in a manner that does not require Defendants to enumerate and allocate the LDS missionaries who are temporarily living abroad, the Act must also be interpreted to exclude other similarly situated members of the population, such as federal employees and dependents.

Count VII
(The Religious Freedom Restoration Act)

70. Plaintiffs reallege paragraphs 1-69 as if set forth fully herein.

71. RFRA provides, in relevant part, that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that application of the law in question "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

72. It is a central tenet of the LDS faith that members of the LDS church should travel abroad to engage in religious proselytizing and community service. Members of the LDS church have been called to

serve as missionaries outside of the U.S. since the earliest days of the church.

73. Defendants' disparate treatment of U.S. citizens temporarily living abroad substantially burdens the free exercise of the LDS faith. Defendants' actions in excluding from the census LDS missionaries serving abroad frustrates, rather than furthers, the compelling governmental interests associated with the census. Defendants' actions are not the least restrictive means for furthering any compelling governmental interests.

74. Accordingly, Defendants' actions in excluding temporarily absent LDS missionaries from the census, while including similarly situated federal employees, violate the provisions of RFRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, by their undersigned counsel, request that the Court grant the following relief:

(a) enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring that the Census Bureau's disparate treatment of similarly-situated citizens violates the provisions of the APA, RFRA, Section 2a of Title 2, and the Census Act;

(b) enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring that the Census Bureau's disparate treatment of similarly-situated citizens violates Section 2, Clause 3 of the United States Constitution, the First Amendment, Section 2 of the

Fourteenth Amendment, and the Equal Protection Clause of the Fifth Amendment;

(c) enter an injunction requiring Defendants to apply the "usual residence" rule to the temporarily absent LDS missionaries who were undercounted in the 2000 census or, in the alternative, enter an injunction requiring Defendants to remove the other temporarily absent citizens from the apportionment count; and

(d) grant such further relief as this Court deems just and proper.

Respectfully submitted,

/s/ MARK L. SHURTLEFF
Mark L. Shurtleff
Attorney General of Utah
Raymond A. Hintze
Chief Civil Deputy Attorney General
J. Mark Ward
Assistant Attorney General

Thomas R. Lee
1395 E. Canberra Dr.
Lindon, UT 84042
801-378-9024

Gene C. Schaerr
Michael S. Lee
Jay T. Jorgensen
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
202-736-8000

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by facsimile or hand delivery on January 30, 2001 on each of the persons listed below:

Hon. Paul M. Warner (VIA HAND DELIVERY)
U.S. Attorney's Office, District of Utah
185 South State Street #400
Salt Lake City, UT 84111

Hon. Paul M. Warner
U.S. Attorney's Office, District of Utah
185 South State Street #400
Salt Lake City, UT 84111

Sandra Schraibman (VIA HAND DELIVERY AND OVERNIGHT COURIER)

Amy M. Allen
Rupa Bhattacharya
United States Department of Justice
901 E Street, NW
Room 976
Washington, D.C. 20530

/s/ RAYMOND A. HINTZE
RAYMOND A. HINTZE

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No. 01-283

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

REPLY TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Bldg.
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Appellants

* Counsel of Record

November 2, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The statutory and constitutional questions that determine a State's representation in Congress and in the Electoral College are of paramount importance to a State and are surely "substantial." Appellees' Motions to Dismiss or Affirm fail to offer any persuasive reason why this Court should deny to the State of Utah the opportunity for full briefing and argument on the fundamental issue of whether it or North Carolina is legally entitled to an additional seat in Congress and in the Electoral College.

Indeed, the Motions merely highlight the need for plenary review. For example, rather than attempting to defend the district court's decision on its own terms, appellees repeatedly offer alternative (and erroneous) arguments in support of the result the court reached. Moreover, like the district court's opinion, the Motions flatly ignore Utah's textual objection to the Census Bureau's partial count of the overseas population, and likewise fail to address a series of vexing questions that necessarily flow from the district court's confusing attempt to justify the Bureau's decision on policy grounds. Thus, this Court should note probable jurisdiction and order full briefing on the merits.

I. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE APPLICATION OF THE CENSUS ACT AND THE CENSUS CLAUSE.

Appellees do not dispute that the decision below resolves significant issues regarding the proper application of the Census Act and the Census Clause that were left open by this Court's decision in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). Indeed, the Solicitor General concedes that *Franklin* "does not squarely control the instant case." SG Mot. 24. Nor do appellees dispute that, without this Court's plenary consideration, the lower court's resolution of these issues will govern congressional apportionment in the future.

1. Like the district court, appellees never squarely address Utah's central textual argument: the Bureau's duty to count

the "whole number of persons" in the "population" precludes the Bureau from selectively enumerating isolated segments of the population and excluding others on grounds of political or pragmatic expediency. JS 3, 17-18; see U.S. Const. art. I, § 2, cl. 3; *id.* amend XIV, § 2; 13 U.S.C. § 141(a). If overseas federal employees are part of the "population" of their home states, then any overseas citizen who has retained ties to his home state also must be a member of the overseas "population" of that state, see *Franklin*, 505 U.S. at 806, and his membership in that "population" cannot turn on whether he happens to be on assignment for the federal government, as opposed to a private employer or a religious institution.

Appellees' silence on this issue is deafening. It confirms that there is no plausible construction of the governing statutory and constitutional requirement of an enumeration of the "whole number of persons" in the relevant "population" that would limit those terms to persons who happen to be employed by the federal government. Plenary review is warranted on this fundamental textual issue.

2. Appellees also fail to resolve the logical dilemma that plagued the district court's analysis of the constitutionality of the Bureau's action. On one hand, if the inclusion of federal employees who have "retained their ties" to their home States is consistent with "the underlying constitutional goal of equal representation," as *Franklin* suggests, *id.*, then the inclusion of LDS missionaries is similarly appropriate. The undisputed record below establishes that such missionaries have retained similar (if not stronger) ties to their home States and are similarly enumerable by reference to administrative records. See Pls.' Am. Statement of Undisputed Facts ("ASUF") ¶¶ 30, 54-56, *attached to* Pls.' Reply Mem. in Supp. of Summ. J., *Utah* v. *Evans*, No. F-2-01-CV-23B (D. Utah filed March 5, 2001).

Appellees make no effort to challenge Utah's showing on this point. Instead, they retreat to the notion that the inclusion

of LDS missionaries would be inconsistent with "[c]onsiderations of fairness and confidence in the integrity and political neutrality of the census." SG Mot. 17. In so arguing, however, appellees run headlong into the second prong of the logical dilemma noted above: if the selective inclusion of only one segment of the overseas population is unlawful, that defect also dooms the Census Bureau's arbitrary enumeration of only overseas federal employees.

The Bureau, in short, cannot have it both ways. If inclusion of overseas Americans who retain ties to their home states advances the constitutional goals of the census, LDS missionaries should be included in the apportionment count. On the other hand, if isolated segments of overseas Americans cannot be included because of concerns about neutrality or equality, federal employees must be excluded. At least one of these propositions must be true, and either of them would give Utah its fourth seat in the House. Again, neither the district court nor the appellees have offered any plausible way out of this quandary, and plenary review by this Court accordingly is in order.

3. North Carolina attempts to resolve this dilemma by echoing the district court's view—also advanced by the Bureau below—that the distribution of overseas federal employees is somehow representative of the total overseas population, or at least more so than that of LDS missionaries. See NC Mot. 19; see also JS App. 17a-18a. As noted in the Jurisdictional Statement, however, this is one of the most troubling aspects of the district court's decision. It would authorize the Bureau to use what amounts to statistical sampling in enumerating the overseas population, in violation of *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 334-43 (1999). See JS 16-18.

To his credit, the Solicitor General now concedes the incorrectness of the district court's analysis of this point,

noting that "[t]he fact that federal personnel stationed overseas are in some sense representative of the total United States population is not . . . a sufficient ground for including them in the count." SG Mot. 23. Unfortunately, however, the Solicitor General's concession is not binding on the Bureau. Accordingly, unless this Court reviews the decision below, the Bureau will be left with the discretion to enumerate the overseas population by means of the statistical sampling method that this Court has already held unlawful.[1]

4. Appellees do not dispute that the district court's interpretation of *Franklin* would authorize the Bureau to discriminate among groups of overseas Americans based on arbitrary and non-textual considerations such as the relative "contributions" that those groups make to their country. See JS 15, 20-21. Instead, the Solicitor General attempts to buttress the decision below by citing other factors that are equally arbitrary and non-textual—such as the fact that overseas federal employees have more "enduring tie[s]" to their country and "often live or work in areas" where they are subject to extensive regulation by the federal government—that he believes distinguish LDS missionaries from overseas federal employees. SG Mot. 20. Those factors, however, are simply irrelevant. They pertain only to the employees'

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[1] Appellees also point to the fact that the distribution of LDS missionaries is skewed in favor of one particular State, or at least more so than the distribution of overseas federal employees. *See* NC Mot. 19; SG Mot. 17. But that fact can hardly serve as a basis for summary affirmance, particularly since neither the district court nor appellees have ever explained how the Bureau could fairly determine the degree to which enumerating one component of the overseas population may inure to the benefit or detriment of "one state, or a group of states," JS App. 18a, without implicating the Census Clause or the Census Act. *See* JS 23. Thus, the fact that different segments of the overseas population are distributed differently among the States only underscores the need for this Court to decide whether, and under what circumstances, the Bureau may validly enumerate only one of those segments while consciously excluding others.

connection to the federal government, not to whether they have "retained their ties *to their home States*," *Franklin*, 505 U.S. at 806 (emphasis added), and thus can be identified and allocated to their respective States under this Court's decision in *Franklin*.

All Americans overseas who may be eligible for inclusion in the apportionment count are by definition United States citizens. The question, therefore, is not whether they have sufficient ties to their country, but whether their ties to their home *States* permit them to be treated as usual residents of those states for apportionment purposes. The Solicitor General's argument thus boils down to a standard of absolute, unfettered discretion for the Bureau to enumerate or exclude any segment of a population that it may choose. Plenary review is necessary to forestall that unlawful result.

5. Like the district court, appellees also argue that overseas federal employees are entitled to special treatment in the census because they are supposedly easier to enumerate than most other Americans living overseas. See SG Mot. 21. But appellees' reiteration of this argument suffers from the same infirmities that plagued the district court's opinion. Indeed, appellees have all but ignored undisputed evidence that, based on records maintained by the LDS Church, LDS missionaries can be identified and allocated to their respective home States with at least the same degree of accuracy as overseas federal employees. See JS 19-20.[2]

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[2] Appellees are also incorrect in contending that "the integrity of the census would be compromised if the task of enumerating subsets of the population were effectively delegated to private organizations." SG Mot. 22. The Bureau's own publications show that it already relies on records maintained by private organizations in conducting the decennial census. For example, the Bureau uses private records to enumerate individuals living in privately operated group homes (*e.g.*, retirement homes, etc.), private prisons, and dormitories. *See* U.S. Dep't of Commerce, *Census 2000 Operational Plan* IX-4 to IX-5 (Dec. 2000).

6. Appellees also argue that Utah lacks standing to pursue *one* form of the remedy sought in its Second Amended Complaint. Specifically, they argue that Utah cannot demonstrate that it would be entitled to a fourth Representative if the Bureau conducted a complete enumeration of all Americans residing temporarily overseas on April 1, 2000, and that the State therefore lacks standing to pursue such relief. This argument fails for three reasons.

First, it mischaracterizes the nature of the relief sought by the State of Utah. Utah is not asking for a new census. Rather, as discussed above and in the Jurisdictional Statement, Utah seeks an order declaring that the Bureau's disparate treatment of similarly situated components of the overseas population is unlawful, and directing that the Bureau adjust the apportionment count accordingly. See SG Mot. App. 19a-20a. The Bureau might make such an adjustment by excluding overseas federal employees,[3] or by including others (like LDS missionaries) who may be similarly situated, but Utah has never sought a broad recount of the full overseas population.

Second, the Solicitor General's standing argument incorrectly assumes that Utah failed to produce adequate evidence "to support the[] premise that the population of United States nationals residing abroad is . . . distributed" in such a way that a complete enumeration of that population would entitle Utah to a fourth Representative. SG Mot. 15.

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[3] The Solicitor General's only remaining objection to this exclusion is the unexplained assertion that it somehow would be "wholly disproportionate" at this date. SG Mot. 18. Without more, it is difficult to know what standard of "disproportionality" the Solicitor General has in mind (and that unanswered question alone merits plenary consideration), but this much is clear on the undisputed record below: the Bureau's partial count of the overseas population affected only Utah and North Carolina (and no other States), and in that sense the exclusion of overseas federal employees would be precisely tailored to offset the bias produced by the Bureau's discriminatory count.

In fact, Utah *did* produce empirical evidence to that effect, and it was the only party to produce such evidence below.[4]

Third, in any event, this standing argument was implicitly rejected by the district court. Accordingly, it has never been fully addressed on the merits and is not an appropriate basis for summary affirmance.

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS REGARDING THE INTERPRETATION OF THE "SUBSTANTIAL BURDEN ON RELIGION" INQUIRY UNDER THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FREE EXERCISE CLAUSE.

As shown in the Jurisdictional Statement, the district court also made a fundamental error in assuming that, to establish a "substantial burden" on religion, a RFRA or Free Exercise plaintiff must prove that he was *personally* deterred or discouraged by the government action at issue from engaging in a religious practice. Appellees' own treatment of this issue confirms that it presents a substantial federal question.

1. Instead of attempting to defend the district court's decision on its own terms, the Solicitor General begins by offering alternative bases for the result below. Joined by North Carolina, he argues that the burden imposed by the

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[4] Specifically, Utah submitted empirical evidence showing that it would be entitled to a fourth Representative if the Bureau expanded the apportionment count to include not only overseas federal employees, but also college students studying abroad, LDS missionaries, and all other Americans living abroad on April 1, 2000. *See* Wolfson Decl. ("Wolfson II") ¶¶ 28-35 (Mar. 5, 2001); ASUF ¶¶ 38-39. Moreover, Utah's statistician and demographer provided a scientific explanation—based in part on empirical data obtained from the Bureau, *see* Wolfson II ¶ 32—for her expert opinion that an attempt to enumerate all such persons would have resulted in Utah obtaining a fourth Representative. *See id.* ¶¶ 30-34. Neither the federal defendants nor North Carolina offered any evidence to rebut Utah's evidence on this point.

Bureau's policies—*i.e.*, the loss of a fourth Representative—is not unique to the missionary plaintiffs, "but is shared equally by all other persons" who claim Utah as their place of permanent residence. SG Mot. 28. That fact, appellees argue, makes it impossible for the missionary plaintiffs to establish that the Bureau's enumeration practices impose a substantial burden on the free exercise of their religious beliefs. *Id.* at 25-28; NC Mot. 29.

Appellees cite no support for this novel restriction on a plaintiff's ability to establish a substantial burden. And any such restriction would be unwarranted. The mere fact that a government-imposed burden on the free exercise of religion may inflict collateral damage—even substantial damage—on others does not make the burden insubstantial.

If the decision below stands, the missionary plaintiffs and others who may be similarly situated will have to live with the fact that their absence from the country on religious business cost their home State an additional Representative and an additional vote in the Electoral College for the next decade. The fact that their missionary service has now imposed enormous costs on their entire State, in addition to denying them the personal benefits they might have received from additional representation, makes the burden more, not less, substantial.[5]

The Solicitor General's argument, moreover, would improperly insulate census decisions from review under RFRA.

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[5] Appellees also attempt to defend the district court's decision rejecting appellants' free exercise claims on the alternative ground that the Bureau's policy is neutral and generally applicable, and therefore falls within the "safe harbor" of *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872, 879-80 (1990). Appellants thoroughly refuted this argument in their briefs before the district court, and appellees do not respond to that analysis in their motions. *See* Pls.' Reply Mem. in Supp. of Summ. J. at 65-69, *Utah* v. *Evans*, F-2-01-CV-23:B (D. Utah filed Mar. 5, 2001).

The impact of a census decision can *only* be felt collectively. Yet RFRA's protective scope extends to "*all* Federal . . . law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a) (emphasis added). The statute's protection is thus not limited to government actions that are capable of inflicting a highly individualized injury. Accordingly, the Solicitor General's alternative argument merely highlights the need for this Court's review.

2. Appellees also make a half-hearted attempt to defend the district court's conclusion that the individual appellants failed to present sufficient plaintiff-specific evidence that the Bureau's decision "'burdened, or even tended to burden or coerce, [any appellant's] free exercise of his religious belief in the performance of missionary work.'" SG Mot. 29. Like the district court, however, appellees cite no case law for the proposition that a substantial burden on religion can be established only through evidence that the plaintiff *himself* was "coerced" in some manner that deterred or "tended" to deter him from pursuing a religious practice. Nor do they address the case law cited in the Jurisdictional Statement, see *Mockaitis* v. *Harclerod*, 104 F.3d 1522 (9th Cir. 1997), which shows that the district court was wrong to require such plaintiff-specific evidence. See JS 25-27.

Instead of addressing this issue head-on, the Solicitor General attempts to recharacterize the issue as whether "a plaintiff must actually forego religious exercise in order to assert a valid RFRA claim." SG Mot. 29. In fact, a close reading of the district court's opinion suggests that this is precisely the standard it applied. See, *e.g.*, JS App. 10a-11a. But regardless of whether the district court's opinion can fairly be read to require that a plaintiff forgo a religious exercise, there can be no doubt that the district court's decision requires plaintiff-specific evidence of coercion that

would at least "tend" to encourage that result. That is the core ruling challenged by the appellants here.[6]

Nor can there be any doubt that appellants would prevail under the proper standard. Appellees do not dispute (1) that the missionary plaintiffs were serving overseas on April 1, 2000, (2) that their presence abroad was compelled by sincere religious belief, (3) that their exclusion from the 2000 census was the direct result of their decision to act on that belief, or (4) that the Bureau's failure to count them (and others like them) resulted in their State being allocated one fewer Representative, and one fewer vote in the Electoral College. Under those circumstances, it cannot be denied that the Bureau's practices have a general "'*tendency* to coerce individuals into acting contrary to their religious beliefs,'" *Thiry* v. *Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (emphasis added) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). The district court's failure to apply the correct standard—and its error in requiring plaintiff-specific evidence of coercion—therefore raises a substantial question that merits this Court's review.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse the judgment of the district court.

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[6] North Carolina incorrectly suggests that, during a summary judgment hearing before the district court, "appellants conceded . . . that they had no" evidence indicating that any plaintiff's religious liberties were substantially burdened. NC Mot. 4. Appellants made no such concession. Rather, appellants simply conceded that there was no evidence that any individual missionary considered, at the outset of his service, the possibility that he would not be counted in the 2000 census. *See* NC App. 13a.

Respectfully submitted,

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
RAYMOND A. HINTZE
CHIEF CIVIL DEPUTY ATTORNEY GENERAL
J. MARK WARD
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114
(801) 538-1191

THOMAS R. LEE*
524 J. Reuben Clark Bldg.
Brigham Young University
Provo, Utah 84602
(801) 378-9024

CARTER G. PHILLIPS
GENE C. SCHAERR
MICHAEL S. LEE
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Appellants

November 2, 2001

* Counsel of Record